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OVERSIGHT OF THE COPYRIGHT OFFICE AND THE COPYRIGHT ROYALTY TRIBUNAL

HEARING

BEFORE THE

SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

FIRST SESSION

ON

OVERSIGHT OF THE COPYRIGHT OFFICE AND THE COPYRIGHT ROYALTY TRIBUNAL

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THURSDAY, MARCH 10, 1983

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON PATENTS, COPYRIGHTS AND TRADEMARKS,
Washington, D.C.

The subcommittee met, pursuant to notice, at 2 p.m., in room 226, Dirksen Senate Office Building, Senator Charles McC. Mathias, Jr. (chairman of the subcommittee) presiding.

Also present: Senators Hatch, Metzenbaum, and Leahy.

OPENING STATEMENT OF SENATOR CHARLES McC. MATHIAS, JR.

Senator MATHIAS. The subcommittee will come to order.

The temptation to call this an historic moment has just dissipated because the Register of Copyrights has commented to me that he was testifying before this committee 20 years ago.

We are meeting this afternoon to speak to two men who speak with great authority in the copyright field: The Register of Copyrights, David Ladd, and the Chairman of the Copyright Royalty Tribunal, Edward Ray.

I think everyone is now aware this committee has been created—or recreated—in recognition of the pressing importance of intellectual property to the American economy, to our security as well as our prosperity. It is an interesting fact that you can't suppress an important subject. Although the Judiciary Committee for awhile thought intellectual property did not need recognition and attention of a special subcommittee, it was a proven fact that it was, in fact, necessary.

For several years now, we have been looking at the copyright laws with special reference to technological developments in the world, the need to form the law as the world changed so that the law, in fact, can contemplate the miracles of today's space age communication and computer technology.

New technologies for capturing and storing the works of intellectual and artistic import have developed at a breathtaking pace during our lifetime. These developments have imposed a tremendous strain on our copyright and other intellectual property laws. However, the very ingenuity of our age that has produced these scientific marvels should be able to devise laws to accommodate them, so perhaps the historic thing that we are doing today is to begin an effort to move the law into the 21st century, and show the focus of this hearing will be copyrights.

We will look at the operations of the Copyright Office and the Copyright Royalty Tribunal—both their budget and administration, and their rulemaking roles within the Government.

I would also ask them to comment briefly on the legislative agenda of the Judiciary Committee in the copyright area, especially about the need to accommodate the law to new technology.

We have pending before this committee already bills that address the home taping controversy, bills with which members of the committee are well acquainted from extensive hearings and examination of the issue in the last Congress.

The subcommittee will also look into copyright protection for semiconductor chips, as well as computer programs, the treatment of cable television under copyright law, and the recently released report of the Register of Copyrights on library photocopying.

The hearing record will remain open for 3 weeks to receive additional testimony, such as answers to written questions the committee members may wish to submit after today's discussions.

I will first ask the distinguished Senator from Utah, Mr. Hatch, if he has any statement to make.

STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. Thank you, Mr. Chairman.

Mr. Chairman, I would also like to welcome our witnesses this afternoon, and congratulate you for your appointment as chairman of this newly formed subcommittee. Your colleagues recognize you as an authority on intellectual property issues and I am delighted to serve on this panel, under your leadership.

As chairman of the Subcommittee on the Constitution, I have a devoted interest in ensuring our citizens full protections and benefits bestowed upon us by the Constitution. Exclusive rights, enjoyed by authors in their works, are founded in law upon the Constitution. Article I, section 8, clause 8, of the U.S. Constitution grants Congress the power——

> To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

It is the duty of our witnesses today, as it is our duty, to ensure the protection of constitutionally created rights. I welcome our witnesses, and look forward to their remarks.

Thank you, Mr. Chairman, for calling on me.

Senator MATHIAS. Mr. Ladd.

STATEMENT OF DAVID LADD, REGISTER OF COPYRIGHTS AND ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES, THE COPYRIGHT OFFICE, THE LIBRARY OF CONGRESS, WASHINGTON, D.C.

Mr. LADD. Thank you, Mr. Chairman, and Senator Hatch.

We appreciate the opportunity to appear before you today.

When I commented before the opening of today's session that I testified before this committee 20 years ago, I meant specifically this subcommittee and the Copyright Office welcomes the reconstitution of the Subcommittee on Patents, Copyrights, and Trade-

marks and we congratulate you on your appointment to the chairmanship.

In my previous incarnation as Commissioner of Patents, I enjoyed the most cordial and fruitful relationship with the committee as a whole and particularly with the late Senator McClellan, and I am sure that will be characteristic of our work together on this important subcommittee in the years ahead.

Before I turn to the introduction of colleagues who are with me, Mr. Chairman, I would like to thank you publicly, as I have done privately, for your accompanying the American delegation to Paris in December to the meeting sponsored by UNESCO and the World Intellectual Property Organization to deal with rising international problems with the regulation of cable television and also to thank Mr. Oman for being there.

Aside from the other benefit, your presence there attested to the importance that the Congress attaches to copyright issues and the particular issues which were before that body at that time.

Now, let me introduce my colleagues.

On my right is Dorothy Schrader, Associate Register of Copyrights for Legal Affairs, and Richard Glasgow, Assistant General Counsel.

Senator MATHIAS. I am happy to have both of them here today with you.

Mr. LADD. If it is agreeable with you, we have submitted a prepared statement for the record. It can serve as a basis for any questions you and the members of the subcommittee may wish to ask later.

Senator MATHIAS. Without objection, the full statement will be included in the record.

Mr. LADD. Mr. Chairman, I will divide my remarks into the divisions as they appear in the prepared statement.

First, a brief statement on the budget of the Copyright Office, since this is the first hearing since the reconstitution of this subcommittee. Then, I will turn to a brief canvas of some of the major items on the legislative agenda before the Congress in the copyright field. Finally, I will report very briefly on the administrative developments.

The primary mission of the Copyright Office is to maintain a public registry relating to the registration and ownership of copyrighted works.

In connection with that function, a central operation is the consideration of applications for registration and deciding whether or not they meet the statutory requirements for registration. Allied to that is the cataloging function which is used not only by our office, but also by the public, in order to determine the copyright and ownership status of these works.

Another important function is our Information and Reference Division, which primarily handles inquiries from the public. It is important because, to a larger extent than most Government agencies, we take members of the public and authors by the hand and acquaint them with the procedures and with the use of our catalog and other records.

I think it will be of general interest if I tell you that the Copyright Office budget is approximately, speaking in round numbers,

$15 million a year. We receive about $5 million a year in fees, which have not been revised since the recodification of the copyright statute effective in 1978. The value of the deposits we take in with the applications for registration, and under the deposit sections of the act, is about $6 million. So, against the budget of about $15 million, the $5 million in fees and the $6 million in deposits comes to about $11 million. I might say that in many areas, such as sound recordings, graphic works, cinematic works, and the like, the copyright deposits are the principal source of acquisition for the Library of Congress.

We have, in addition, a function in terms of granting licenses for jukeboxes and, at the moment, there is controversy regarding the rates but not as far as our functions are concerned. We also collect the royalties under the compulsory license for secondary transmissions by cable television systems. The Copyright Royalty Tribunal is not a part of the Copyright Office. We simply collect the fees. We collect them in accordance with the rates set by the statute and revised by the CRT. We are in a sense the conduit for the royalties, which are distributed at the direction of the CRT in accordance with its distribution decisions.

Finally, in the Copyright Office we have another major function, which is to make recommendations to the Congress about legislation, to comment on the legislation introduced by others, and to prepare studies which we hope are useful in consideration of those issues. In the past year, examples of those are the report that we filed with the Congress on the manufacturing clause of the Copyright Act and its proposed expiration, and the photocopying study relating to section 108 of the statute, which you noted in your opening remarks.

Now, Mr. Chairman, let me turn to a consideration of selected legislative issues and developments in the field of copyright law.

As you also mentioned in your opening remarks, the Congress had before it in the last session, and already has before it at this session, proposed legislation relating to home off-air video and audio taping. It is very well known to everybody. But, simply, to make the record complete, I will say that the famous *Betamax* case was argued before the Supreme Court on January 18 and, of course, everybody is awaiting a decision on that now. We have recommended to the Congress in the past, regardless of what the result is in that case, that Congress should act legislatively, and there are some important issues relating to home taping which are not involved in that litigation and which will not be resolved by it in any case.

The bills which have been introduced into the Congress are roughly of two kinds. The first kind would simply grant a blanket exemption for home taping. The second would allow home taping, but would also establish a system for compensating copyright owners for the taping activity. The bills of the second kind would impose a fee on the sale of VCR's and audio recorders, and on the tapes, and these fees would be distributed to the copyright owners. I might pause here to say no bill in Congress contemplates prohibiting home taping.

Related to that, but distinct from it, is the question of amending the first sale doctrine of the copyright law, which is embodied in

section 109 of the statute, so as to extend the control of copyright owners over the commercial rental of tapes of sound recordings and of motion pictures and other audiovisual works.

We submitted a statement on this issue during the last session of Congress. We supported the bill in general terms. There is no doubt that the proposal would represent a substantial change in our law, and bills have already been introduced into this session of the Congress dealing with the same issue.

Third, in the last session of Congress, the House and the Senate both in various committees gave extended consideration to the modification of section 111 and related sections of the statute dealing with the compulsory license for cable television.

I have no information as to whether those issues will reappear. A bill was passed by the House last year as a result of the deregulatory action of the Federal Communications Commission but was not acted upon in the Senate. That deregulatory action removed the limitations on the number of distant signals that could be imported into local cable markets and also removed the exclusivity rules. Both sets of rules were important buttresses for section 111 of the copyright stutute, which lays down the law on the cable compulsory license.

There was a joint relationship between the FCC regulatory function and the compulsory license of the Copyright Act. Because of the action of the FCC, copyright owners have pressed for consequent amendments to the cable compulsory licensing provision of the Copyright Act.

Two bills or proposals were laid before the Congress. The first would import into the Copyright Act some of the regulatory aspects which previously had been contained in the FCC rules. The second kind of bill proposed the discontinuation, after a transition period, of the compulsory license, thereby requiring cable systems like all other users of program materials, to compete for programing in the marketplace.

Fourth, there are now initiatives within the Government ultimately to bring before the Senate the question of whether or not the United States should ratify the Brussels Satellite Convention. That Convention is intended to control the unauthorized interception and distribution of program-carrying satellite signals. The United States was importantly involved in the formation of this agreement. My predecessor played a particularly prominent role in that effort. The text was settled in 1974 and to date there are seven signatory nations which are mentioned in our prepared statement, and there is a strong wish on the part of numerous American copyright interests that the United States should now accede to the Convention.

Fifth, I would like to characterize very briefly the 108(i) study; that is to say, the library photocopying study which the Copyright Office submitted around the first of this year, and to make some recommendation in connection with that.

The recommendations are specifically twofold, aside from the particular legislative recommendations that we make in the report. The first is that the congressional committees, this subcommittee, hold hearings at a convenient time on the report in order to receive the reaction of the various interested parties. The second rec-

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ommendation is that either before or after that hearing the Congress signal to the parties whose interests are involved, the clear wish and expectation of the Congress that the remaining unresolved issues in connection with library photocopying be resolved by voluntary negotiations and within a particular time frame. I will come back to those recommendations in the course of describing the study.

The library photocopying issue was one of the most vexatious throughout the revision period, especially in the closing stages. It was not completely resolved by the codification, and that was understood by everyone.

As a result of that, two things happened: First, a National Commission on New Technological Uses of Copyrighted Works [CONTU] was formed and charged with responsibility for making recommendations concerning library photocopying. CONTU's recommendation regarding section 108(g)(2) was commented upon favorably in the conference report accompanying the bill enacted in 1976.

The second thing was that the bill as passed contained a specific section, 108(i), mandating the Copyright Office at 5-year intervals after the effective date of the act to assess the balance which had been struck by the act between, it says, creators and users, but generally between creators and copyright owners on the one hand, and users on the other. The report which we filed in January of this year was in fulfillment of that statutory mandate.

Let me characterize very briefly the process by which the report was developed. First of all, there was a series of regional hearings held throughout the United States with witnesses from all sections of the country being afforded an opportunity to comment. By the way, before those hearings the Copyright Office identified a specific agenda of questions to which it wanted the witnesses' attention directed.

Second, there were numerous written submissions made from all sectors of the public.

Third, the Copyright Office contracted for a study with an outside contractor, King Research, Inc., to measure empirically the conduct of libraries, users, and publishers under section 108. I might say in this connection that the cooperation of the libraries in getting access to the data which were needed and which were reported in that report was remarkable, and that the study could not have been effectively conducted without the cooperation which was forthcoming from the library community.

In addition groups were formed within the Copyright Office and outside, which acted as advisory groups to this ongoing endeavor. So much for the process.

The basic conclusion to which the Copyright Office came in the report is that, in the main, the basic framework concerning library photocopying is workable, but that, in practice, because there are remaining ambiguities and differences of opinion as to the meaning of provisions of the law, some kind of resolution of the issues is required.

Because the specific recommendations we made are set out in executive summary to the report, I am going to skip those now unless the members want to bring me back to discuss them. They are not

numerous, but I will at this point skip them, aside from the recommendations that I have already made to you about issuing the call for voluntary negotiations.

I want to make very clear, as we did in the report and as we did before the House Oversight Committee, that we are much more concerned with the resolution of the outstanding issues than we are with the acceptance of our particular conclusions and recommendations. Our purpose in the report was to try to state those issues in such a way that they now will be addressed, or, if anyone fails to address them or refuses to do so, that failure and that refusal will be obvious to all. It is to that end that we recommend that the committees hold hearings on it.

In the past the Congress has expressed the desire for a voluntary resolution of such issues, and that has worked. In particular, the CONTU developed guidelines relating to interlibrary arrangements. Other negotiations led to guidelines for classroom copying and to the copying of music for educational purposes. Those things were all voluntarily hammered out. Such resolutions, of course, are especially effective because they do represent consensus rather than the imposition of legislative or bureaucratic fiat.

In addition, the voluntary guidelines on off-air taping for educational purposes were likewise successful, because they were voluntarily worked out.

Senator METZENBAUM. Is it possible that voluntary agreements can be worked out between the parties without guarantees that the interests of those economically affected will be taken care of?

Mr. LADD. Senator Metzenbaum, I do not think it is likely, and I will tell you why I don't think it is likely.

In the debates, the dialog has taken place largely between the proprietary side, represented by the publishing community, and the user side, represented by the library and educational communities.

For reasons which we explained in the report, the publishers tend also to represent the authors as surrogates. One of the criticisms that has been made privately, but not yet publicly, was that in the preparation of our report, we did not take into account the views of the authors. The statute particularly says we will examine the balance struck between the creators and the users. If there is not a complete congruence of interest between authors and publishers, there is an allied interest, especially with respect to the photocopying issue. The authors were effectively represented in these proceedings by the Authors League.

On the other hand, the librarians tend to represent not only their views but to speak for the consumers as well.

My own appraisal is that the consumer interest was effectively represented from the library side. As a matter of fact, I do not see any basis for a failure of the library community effectively to speak for all of the interests of the consumers. Consumers were also welcome to appear and some consumer organizations did appear and submit written comments.

Senator METZENBAUM. You said, "parties themselves making an effort to resolve the matter."

My question is, Is that the best solution?

It may be the best solution for the parties, but is it the best solution for the country?

Mr. LADD. For the reasons I have stated, I think the public's interest will be taken into account, and there is one other statement that has to be made in this connection. They are voluntary guidelines; they do not have the force of law, they are influential, but if they are unsatisfactory and if the consumers do not like it, the Congress can revise the law at any point.

Senator METZENBAUM. I know that Congress can revise law at any point. That is not new information to me.

Mr. LADD. I did not intend to be impertinent.

One of the reasons I think it is desirable that this process be tried is that it will perhaps spare the Congress some grief. This is a very volatile issue on which people hold very strong opinions emanating from quite different philosophical outlooks on what the function of the copyright law is and what the role of proprietors and libraries is to supply information to the public.

We talk about information. We tend to think about scientific and technical and medical publications, but the photocopying issue spans all copyrighted works including books as well as the STM publications.

A reason for doing it in this way is that if the resolution is satisfactory to the Congress, then it can be accepted and the Congress will be spared the hugger-mugger that has gone on about this issue for the past 10 or 15 years. If it is not satisfactory, the Congress can change the law anytime.

In the main, to the library people it is satisfactory; and that view was recently expressed in the Library Journal of March 1, 1983, in a statement from the executive director of the American Library Association, at page 4.

Let me tell you briefly what the outstanding photocopying issues are. One is the relationship between sections 107 and 108. Section 108 is the section which grants specific rights to libraries to make photocopies. The question is whether or not libraries have additional rights beyond those provided in section 108, and there is a dispute about whether it does. There also is the question of the meaning of the ban on systematic photocopying which is not defined in the statute and not clearly defined in the legislative history. There is a question of whether libraries have any responsibility to prevent infringing photocopying by users. And there is a question of whether libraries can claim their use beyond section 108 as fair use, not only for themselves but also as surrogates for their users, which is to say the public.

I might state in closing, on the photocopying issue, that there really are three options for resolving these important and difficult remaining issues. One is, as I say, a voluntary resolution by negotiations which have resulted in the voluntary guideline in the past and about which I am aware of no complaints from any sector. The second is legislative change. And the third, of course, is judicial construction which will be necessary in some cases unless there is clarification through voluntary resolution or by legislative change.

The condition of the Copyright Office administratively, which is the final topic in my opening statement, is reflected fully, I think,

on the graph which constitutes the last page of the prepared statement.

In general, our staffing is going down. Our receipts are going up. The backlog is going down and productivity is increasing.

I might say that, generally, the number of cases that we are receiving is rising this year in the range of 5 to 8 percent. Our present strategy is, and has been for the last 2 or 3 years, to try to accommodate that rise in workload by increases in productivity and, thus far, we have been successful.

Thank you very much, Mr. Chairman. That completes my opening statement, and I will be glad to respond to questions.

Senator MATHIAS. Thank you, Mr. Ladd.

Before we go to questions, I will ask the distinguished Senator from Ohio, a ranking member of the committee, if he has any statements.

Senator METZENBAUM. I have no statement, Mr. Chairman.

Senator MATHIAS. Senator Leahy?

Senator LEAHY. Thank you, Mr. Chairman.

I have no questions.

Senator MATHIAS. I think we need to think a little bit about the work of this committee and what the work ought to be. In some sense, the whole world of intellectual property is in a state of flux. For many centuries, the only way you could get a book was to write one. You either wrote it out of your own mind or, if you wanted to copy someone else's work, you had to take pen in hand and copy it. I suppose in those days intellectual property meant if you held a pencil in hand, you owned it.

Then, around the 16th century, Gutenberg invented movable type and everything changed. For about the first 50 years after the Gutenberg invention, we were in a period of transition, and our time may not be too different from that moment in history.

There were no copyright laws, no restraints on copying. People did what they have done for centuries, except they did it with type instead of pen. Therefore, the works of an author could be pirated freely and were pirated freely all over the civilized world.

Then, some 50 or 60 years later, the concept of protection of an author's intellectual property right began to be recognized, and there evolved the system which we have today, which we call copyright laws. However, for a period of about 50 years, there was really no control. Anybody who could get hold of a text could reprint it and circulate it.

Now, today, for different reasons, we are approaching the same kind of climate in spite of the copyright laws. We are contemplating, as outlined in your statement, certainly the technical possibility that artistic works can be copied and republished by means of machines like Betamax.

Printed works can be copied on a chip. In fact, a work of many volumes can be put on a chip and inserted into the proper piece of equipment, a button can be pushed, and it can be reproduced.

So, all of this is going to make a difference. The question of whether copyright laws could and should cover the Betamax, as you pointed out, is now before the courts and before the Congress.

The question is, whether copyright laws adequately cover a chip. They cover the standard Xerox machine and/or more sophisticated kinds of machines. It is certainly pertinent to our present law.

Whether or not the library user should be able to copy a page that has information which is pertinent to his interests at that moment or whether he should be able to copy the whole book freely, or whether the library user should be able to come in and make 50 copies of the book for the class he has—all of these things would have been irrelevant questions 10 years ago because the technical capacity did not exist. But now the questions become rather pressing in the area of intellectual property.

All of this leads me to the point that you and I have discussed from time to time.

Is it possible for this committee to have some kind of demonstration of the state-of-the-art equipment, some kind of briefing on what can be perceived not only on the market, on the shelf today, but over the horizon, so that we can anticipate the developments and the technology, and instead of having the law lag behind the technology as has been the case, not trying to get ahead of it—God forbid—but at least keep up with it?

Mr. LADD. The answer to your question is yes, that can be done.

A question analogous to yours came up in the House Oversight hearings as well—how can we try to forecast where technology is going and what impacts it will have on the traditional concept of copyright.

In our previous discussions, Mr. Chairman, I was really thinking of an agenda on the copyright issues. I now perceive your question to be asking for a more particular foreview of that technology. I think we can put that together for the subcommittee in cooperation with the various industries, and let me give you an example which I have discussed within recent days.

The Library of Congress is now involved in a pilot project examining the technological feasibility of reducing nearly all types of its collections to optical disc. It raises the possibility of revolutionizing library practices and operations. I don't want to go into it in too much detail at this time, but it involves not only printed materials but also audio, cinematic works, fine arts works, architectural drawings, and the like. The technology, which is more than electronic publishing, is coming on fast; and it is inevitable the copyright problems will be formidable.

In the last 2 weeks, I was talking with Dr. Martin Cummings, Director of the National Library of Medicine. He has invited the staff of the Copyright Office to come out and see his state-of-the-art system for document fulfillment. I asked him whether he would be willing to make provision for Members of Congress and their staffs to come, and his answer was yes. That can be arranged forthwith.

I am sure if we turn to the other copyright-related industries—computers, satellite transmissions, and so forth—that we could arrange briefing programs of a duration and type which can be reviewed by the subcommittee.

Yes, if you want us to do that, we will be glad to undertake it.

Senator LEAHY. Mr. Chairman, I agree with your suggestion. I think it is a great one. It is hard enough to get up on the law for those of us who have not practiced copyright law but even having

learned the law, all the witnesses that came in here last year and some of the people who are writing to us now, keep coming up with the latest technological development, and they say apply the law to that, but I am not sure the present law can be applied. As the technology changes, we are told we have to keep revising the law at the same time.

Senator MATHIAS. Senator Leahy made reference to OTA, an institution set up by the Congress to look at the impact of technological development. If necessary, we could call on OTA for some suggestions for measuring the technological impact.

Senator METZENBAUM. I have just a couple of questions.

I notice that your staffing went down greatly and your receipts went up modestly. My question to you is, are you suggesting that you do not have adequate staffing, that you need more personnel?

Mr. LADD. No.

As a matter of fact, we have requested less money for the coming fiscal year than last year. No, we do have adequate staff.

Senator METZENBAUM. I was not certain of the point you were making.

Mr. Chairman, I am really very anxious to hear the next witness, but I have just been called and told there is a markup on the budget numbers going on right at this minute, so I am going to excuse myself, not for lack of interest but for lack of time.

Senator MATHIAS. We appreciate your being here and, upon reflection, if you have questions, you can submit them for the record.

Senator METZENBAUM. I appreciate that, and I look forward to working with this committee.

Senator MATHIAS. Mr. Ladd, in your prepared statement, you made some reference to the GAO report on the registration processes in the Copyright Office. The Comptroller General made some recommendations in that study. I wonder if any actions have been taken on his recommendations.

Mr. LADD. The improvement which you see in the operation of the Office as shown in the graph on the final page of our statement is the result of program initiatives which were undertaken before the GAO darkened our door.

The GAO study was concerned with the schedule of the implementation of phase III of our copyright inprocess system. I am pleased to say that it is on schedule. In fact, it is slightly ahead of schedule because of action of the Congress last year establishing a filing fee system in lieu of the former registration fee system.

There will be a systematic review of all of the recommendations of the GAO report. One of its central recommendations was to reduce the number of work stations and the consequent repetitive handling of material, and that will automatically result with the full implementation of phase III. We expect that to come on-line before the end of this year, and an invitation will be extended to you and Congressman Kastenmeier to come over and make the first entries into the system.

In addition, another central point in the GAO study was an objection to the number of cases requiring correspondence. We have reduced that substantially from 25 percent of all cases to 20 percent of all cases. That is not really a 5-percent reduction. It is greater than that. It is 5 percent as measured against the entire

workload. There are other initiatives to develop forms, and to expand the use of the telephone to clear up minor matters.

I did this in the Patent Office while I was there and there has already been a marked improvement in that respect, and I expect more. So, yes, there have been actions on the recommendations.

Senator MATHIAS. Computers are matters of great importance to the United States. Pittsburgh was once the steel capital of the world, and Detroit was once the automobile capital of the world. I am not quite so sure of that anymore. We hope they will be again, but the places where we are really pinning our hopes is on computers, American technology, high tech, which, of course, puts a very high premium on computer software.

You note that the question of copyright protection for computer software is not directly involved in the proposal for chip design copyright. What about current proposals to confer copyright protection on computer programs, on computer software, both of which are subject to what might politely be called piracy?

Some people would just call it ordinary daylight theft, very vulnerable to international competitive forces and very important to the future of our economy. What should we be doing in that area?

Mr. LADD. Let me say, I am not in a position to respond fully because I am not on top of these issues. Undoubtedly, they are important and they will become increasingly so in the years ahead.

There is the Edwards bill in the House dealing with semiconductor chips. There are also proposals, referred to as the ADAPSO proposals, to clarify the relationship between trade secrecy laws and the copyright statute, to provide computer programs, and to change the kind of notice which is required on computer programs. I am sure that this legislation will be before the Congress soon.

At the moment, Ms. Schrader is more fully aware of those issues than I am because important issues have arisen within the Copyright Office with respect to how to process applications for the registration of computer programs. I have to turn to those issues myself and get on top of them. I am not there now.

Senator MATHIAS. We can work toward that goal together because, obviously, the committee is not up to date on these issues, but they are enormously important for the American economy. I think both of us have a responsibility to make that part of the agenda of this committee, and I would intend to do that.

Mr. LADD. I might say, Mr. Chairman, that this consideration of the support which copyright gives to American industry in its competition with foreign rivals, is important. I have had discussions with Mr. Oman and others informally, and we are developing a proposal which we will bring to you, suggesting the systematic and ongoing collection of data about the size of the American copyright industries, their employment, their dollar value, and also the effect that they have on the international balance of payments.

I think during the revision process a monograph was prepared, at least published, under the aegis of this subcommittee or its predecessor, which tried to make useful statements about the size of the copyright industries. That report is out of date, and I believe that the data that we are proposing to collect would be important not only to the Copyright Office, but also to the Congress. We welcome that proposal.

Senator MATHIAS. I think we would like very much to see that.

What is happening now should not be a matter of surprise. Economists and demographers have for years predicted the United States would shift its emphasis from a production economy to a service economy. We are now seeing that unfolding. When it is said that we are moving into a service economy, it is not a question of a gigantic international McDonalds. It is a very specific kind of development, a service economy in which computer programs are a very valuable and essential part.

I think if we do not act to protect this new, growing, vital segment of the American economy, we will be extremely negligent. The duty is clearly upon us.

Mr. LADD. I agree, and there are two comments I would like to make in connection with what you have just said.

First, there was a publication of an abstract of a study done in Sweden about the size of the copyright industry in that country, a much smaller country, and I suspect the figures for the United States might be even more surprising. The conclusion was that 6 percent of the gross national product of that nation was copyright related. Now, if anything approaching that figure applies to the United States, then the stakes on copyright policy issues are enormous.

The second point I want to make is this: copyright is increasingly important as America and other countries enter into the service information era; these industries employ many people in this country and are responsible for significant U.S. earnings abroad. Similarly the motion picture industry is important in our balance of trade. As a matter of fact, our copyright industries play a major role in the cultural image which this country projects abroad.

I think that lends added importance to the sufficient protection of copyrights.

Senator MATHIAS. I have just one last question.

One of the issues that we find waiting at the time of this initial meeting is the work-for-hire clause in the 1976 law: an attempt to balance the equities as the Judiciary Committee saw them in 1976.

Do you think the equities are still in balance?

Mr. LADD. Mr. Chairman, Senator Cochran has taken a special interest in this issue and he has introduced legislation. We have given him our preliminary views on that bill. The letter went out over Ms. Schrader's signature because I have not had time to fully review it, but it is very high in the stack of my things to take up. I would like to defer an answer until I have had an opportunity to review that work. I know there are important issues involved.

Senator MATHIAS. Senator Hatch was called away temporarily.

He asked me in case he didn't get back before you left, to express his thanks for your recent letter on his joining the committee, and saying he expects to accept your offer of assistance.

Mr. LADD. I might say on the record publicly, Mr. Chairman, what I said in the letter to the subcommittee. It expressed our gratification for the reconstitution of the subcommittee and, more particularly, it said we look forward to giving Members of Congress assistance of a technical kind even where we may have policy views inside the Copyright Office which may differ from the particular view of the Member of Congress.

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As a matter of fact, we already have a taker.

Senator MATHIAS. You have a taker. I want you to know he accepts this as a genuine offer. He would like to have copies of the amicus brief in the video case and the *Eastern Microwave* case.

Mr. LADD. They will be supplied.

Senator MATHIAS. Thank you very much.

Mr. LADD. Thank you, Mr. Chairman.

[The prepared statement of Mr. Ladd, along with his subsequent response to additional written questions of Senator Mathias, follows:]

STATEMENT OF DAVID LADD
REGISTER OF COPYRIGHTS AND
ASSISTANT LIBRARIAN FOR COPYRIGHT SERVICES

Mr. Chairman and members of the Subcommittee, I am David Ladd, Register of Copyrights in the Copyright Office of the Library of Congress and Assistant Librarian for Copyright Services. I thank you and the Subcommittee staff for giving me the opportunity to appear here today. The Copyright Office looks forward to the benefit of the counsel and direction of your recently constituted Subcommittee in the exercise of your oversight responsibilities.

The copyright law of the United States is founded on the provision of the Constitution (art. I, sec. 8, cl. 8) which empowers Congress —

> * * * To Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This provision embraces the doctrine of according exclusive rights to authors for a limited time as a necessary incentive and just reward for creation of works of authorship. I am grateful for the opportunity to serve this body of law and the rights of those creative talents and entrepreneurs it protects and of the public whose rights it serves.

At this hearing, I will note some of the major copyright issues that have been, or may be, presented to this Subcommittee in the 98th Congress. I will also report on the administrative condition of the Copyright Office. Let me first review the functions of the Copyright Office under the Copyright Act.

I. FUNCTIONS OF THE COPYRIGHT OFFICE.

The Copyright Office is one of seven departments in the Library of Congress, which itself, of course, lies within the Legislative Branch. A central function of the Office is the examination and registration of claims to original and renewal copyrights filed by authors and other copyright owners. The Examining Division of the Office annually examines more than 500,000 claims to copyright in an enormous variety of books, music, motion pictures, sound recordings, dramatic works, and works of art, and makes deter-

minations regarding the legal sufficiency of the claims presented. The Office also records assignments and other transfers of copyright and related documents, and certain notices pertaining to the recording of musical works and the termination of rights earlier granted by authors.

The Copyright Office performs several other functions related to registration and recordation: our Cataloging Division prepares and distributes bibliographic descriptions of all registered works; it also provides basic cataloging for many of the Library's special collections.

Our Information and Reference Division searches and reports, upon request, the copyright facts contained in our records, provides certified copies of certificates of registration, and assists the public in using our files. It also maintains a public information office to answer mail, telephone, and personal-visit inquiries about the copyright law and registration procedures. Unlike some other federal agencies, we often deal directly with individual authors and users who are not generally sophisticated in copyright and the legal aspects of registration. Finally, the Division has an active publication program for the distribution, free-of-charge, of circulars and similar materials on copyright.

A significant aspect of Copyright Office operations is its role in contributing to the collections of the Library of Congress. Under the Copyright Act of 1976 (as well as under the predecessor statute), copies of all works published in the United States with a notice of copyright are required to be deposited with the Copyrignt Office. Those copies are made available, also by law, to the Library of Congress for its collections. Copyright deposits are thus a principal base upon which the Library of Congress builds its collections of books, periodicals, music, maps, prints, photographs, and motion pictures. Last year, the value of those Copyright Office-derived acquisitions, was about $6 million — an interesting figure when compared to our annual budget of about $15 million with some $5 million further offset by collected fees. In many of these areas, copyright deposits form the greatest part of the Library's acquisitions.

In addition to the functions described above, the Copyright Act of 1976 gave additional responsibilities to the Copyright Office. Our Licensing

Division now licenses jukeboxes to perform copyrighted music and collects statutory royalties under these licenses and also collects the royalties paid under the statutory compulsory license for secondary transmissions by cable television systems. These royalties, after deduction of reasonable administrative expenses, are deposited with the Treasury Department for investment in interest-bearing U.S. securities and later disbursed to copyright owners in accordance with distribution determinations by the Copyright Royalty Tribunal, which is not a part of the Copyright Office.

The Copyright Office regularly assists both houses of Congress and their staffs in preparing and commenting on legislative proposals, responding to constituent inquiries, and assisting in the further implementation of the copyright law.

The Copyright Act, and accompanying legislative reports, requires or requests the Register of Copyrights to make certain studies and reports to Congress and your Committee. One of these studies was filed with the Congress in January of this year — the Report of the Register of Copyrights on Library Reproduction of Copyrighted Works — and is summarized later in this statement.

II. THE LEGISLATIVE AGENDA IN COPYRIGHT.

Let me now briefly review the major copyright issues which may be considered in this Congress: Off-air taping of copyrighted works for private use or educational use, commercial lending of sound recordings and audiovisual works, cable television, distribution of "superstation" programming via satellite by resale carriers, the Brussels Satellite Convention, protection for the topography of semiconductor chips, and the Register's Report on Library Reproduction of Copyrighted Works.

A. OFF-AIR TAPING OF COPYRIGHTED WORKS FOR PRIVATE USE OR EDUCATIONAL USE

The application of copyright law to off-air taping of copyrighted works for private use promises to be one of the most-discussed copyright issues before this Congress. The issue of home off-air taping is presently

before the Supreme Court. With respect to off-air taping for educational purposes, it was not possible to develop guidelines covering those uses for inclusion in the legislative reports accompanying the copyright revision bill in 1976. However, guidelines were developed in 1981 and published as part of a House Judiciary Committee report in 1982.*

1. Taping for Private Use

The most celebrated copyright case on home taping is, of course, the well-known case of Universal City Studios, Inc. v. Sony Corporation of America, 659 F.2d 963 (9th Cir. 1981), cert granted, 50 U.S.L.W. 3982 (U.S. June 14, 1982) (No. 81-1687). The Supreme Court heard oral argument on January 18, 1983, but has not yet rendered decision. In this case, the owners of copyrighted audiovisual material brought an infringement action against a videotape recorder manufacturer, the distributor, sellers, the advertising agency retained by the distributor, and an individual. The District Court holding [Universal City Studios, et al, v. Sony Corp. et al, 480 F. Supp. 429 (C.D. Cal. 1979)] (hereafter referred to as Betamax) for the defendants was reversed by the Court of Appeals for the Ninth Circuit. There were three main issues. First, as a matter of statutory construction, did the Congress intend to create a blanket exemption for home video recording from the "bundle of rights" granted copyright owners in §106 of the 1976 Copyright Act? The District Court held that it did. The Court of Appeals disagreed. Second, if home video recording is not excluded from the "bundle of rights," does the doctrine of "fair use" embodied in section 107 of the statute apply? The District Court held that it did; the Court of Appeals, that it did not. Last, if home video recording is not exempt or a fair use, are the corporate defendants who manufacture and sell home video recorders liable for contributory copyright infringement? The District Court held that, even if home video recording was an infringement, the manufacturers and retailers would not be infringers since the machine is a "staple article of commerce." The Court of Appeals reversed, holding that they are contributory infringers because the video tape recorders are manufactured, advertised, and sold for the primary

* H.R. Rep. No. 495, 97th Cong., 2d Sess. 6-11 (1982).

purpose of reproducing television programming, of which virtually all is copyrighted material, and that that "use is intended, expected, encouraged, and the source of the product's consumer appeal." 659 F.2d, supra, at 975.

Immediately after the Court of Appeals decision was announced, several bills were introduced in both Houses — H.R. 4783, H.R. 4738, H.R. 4794, and S. 1758 — which would exempt home video recorders from copyright liability whenever copies were made for private noncommercial use. Thereafter, other bills were introduced, H.R. 5705 and Amendment 1333 to S. 1758, which would grant such exemptions, for both audio and video recordings, and require the payment of royalties on both the recording devices and the blank tapes used to make the copies. Hearings were held in both Houses during the last Congress although no further action was taken on any of the bills.

In this Congress similar bills of both types have again been introduced: H.R. 175 and S. 175 have been introduced to exempt home video recorders from copyright liability whenever copies are made for private noncommercial use; H.R. 1030 and S. 31 have been introduced to grant such exemptions, for both audio and video recordings, and to require payments of royalties on both the recording devices and the blank tapes. Unlike their predecessor bills, however, both H.R. 1030 and S. 31 rely on private negotiations, with compulsory arbitration as a last resort, for setting royalty rates rather than rate-making proceedings before the Copyright Royalty Tribunal.

2. Taping for Educational Use

The copyright and consumer issues which have arisen in the home taping area should be distinguished from off-air taping for educational, classroom purposes. Congress clearly expressed its view that "fair use" had some limited applicability to educational off-air taping. With close cooperation from Congress, the Copyright Office and the Ford Foundation (at an early stage), the proprietary and educational communities met and successfully negotiated a set of guidelines for off-air taping in support of education. Announced in 1981, these guidelines offer stability and certainty to important commercial and non-commercial broadcasting activities. They were not easily negotiated and may require adjustment in the future. But they clearly show

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that such disputes can be settled privately, with flexibility that permits their adaptation to changes in the marketplace and in the classroom. The negotiators deserve commendation for their pioneering efforts.

The Subcommittee may also be interested to know that a decision on the merits was rendered by the U.S. District Court for the Western District of New York in Encyclopedia Britannica Educational Corp. v. Crooks, 542 F. Supp. 1156 (W.D.N.Y. 1982) (off-air taping and reproduction for educational purposes). An earlier decision in the same case had granted a preliminary injunction, 447 F.Supp. 243 (W.D.N.Y. 1978). This case involved large-scale copying of copyrighted audiovisual works by the Board of Educational Services of Erie County, New York (BOCES). Here, without prior requests by teachers, the defendant videotaped, off-air, plaintiff's copyrighted works in their entirety including the copyright notices, maintained a library of these videotapes, and made and distributed copies of the tapes for classroom use without imposing further controls. In holding for the plaintiffs the court found that the defendant's acts were infringing and that defendant's defense of non-profit use, relying on Williams & Wilkins Co. v. United States, 420 U.S. 376 (1975), was not well-founded.

B. COMMERCIAL LENDING OF SOUND RECORDINGS AND AUDIOVISUAL WORKS

Section 109(a) of the Copyright Act embodies the so-called "first sale" doctrine. Under that doctrine, when someone acquires ownership of a lawfully made copy of a copyrighted work, that person is entitled to sell or otherwise dispose of the possession of that copy without the permission of the copyright owner. Thus, the first sale of a particular copy exhausts the right of the copyright owner to control the further distribution (including rentals for commercial purposes) of that copy under the Copyright Act.

On July 29, 1981, Twentieth Century-Fox Telecommunications presented testimony to the Senate Committee on the Judiciary regarding the burgeoning business of video rentals. Their concern is that various retail outlets purchase a copy of a motion picture or videocassette embodying a copyrighted motion picture and then successively rent the copy for a fee to a large number of customers. In these transactions, the copyright owner does not give per-

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mission for the rentals and is not compensated for these rentals other than from the profits of the first sale.

These sorts of rental markets are not limited to movies: as the price of audio recordings has increased, a rental market for musical recordings has also developed. To date, the greater impact has been felt abroad, especially in Japan and Sweden, but more and more audio rental stores are springing up in the United States.

Section 5 of H.R. 5705 and of Amendment 1333 to S. 1758 introduced in the 97th Congress would have created a commercial lending (rental) right in motion pictures and other audiovisual works and sound recordings, by narrowing the scope of the present "first-sale" rule on the public distribution right. The 97th Congress concluded without any action on this proposal.

During this Congress, several bills have been introduced to establish a commercial lending right in sound recordings (H.R. 1027 and S. 32), and in motion pictures and other audiovisual works (H.R. 1029 and S. 33). The Congress may choose to give these questions early attention since they are not encompassed in the Betamax case before the Supreme Court, the rental practice is spreading quickly, and the issues will probably be easier to resolve now than later.

C. RECENT DEVELOPMENTS IN CABLE TELEVISION

Section 111 of the Copyright Act of 1976 represented Congress' resolution of the competing demands of an established broadcast industry, an emerging cable industry, and television program creators and producers. This provision is based historically on a joint use of the copyright law and the laws regulating telecommunications to govern cable retransmission of broadcast signals. Under this scheme, the Federal Communications Commission (FCC), through regulation, governs signal allocation, including the importation of distant broadcast signals by cable systems, as a matter of national communications policy. The Copyright Act, taking FCC regulation into account, establishes a compulsory license mechanism, a statutory device constituting an exception to the traditional grant of exclusive rights in copyrighted works,

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under which cable systems may secondarily transmit certain copyrighted programming without the express consent of the copyright owners, upon payment of statutory royalties and fulfillment of other conditions and obligations set forth in §111.

The Copyright Office is only part of this licensing system: we collect the royalties. The Copyright Royalty Tribunal (CRT), which is not a part of the Copyright Office, is authorized to decide the distribution of those royalties to copyright owners. The initial copyright royalty rates are set in the statute itself. The Copyright Royalty Tribunal is authorized, within statutory constraints, periodically to revise the rates.

The premises of the §111 "settlement" were that cable needed imported signals to survive and the public was entitled to at least a minimum range of available programming which many members of the public did not then have. Cable, it was thought, lacked both bargaining position and alternative sources of program supply to permit acquisition of programming rights by contract in the marketplace. Hence, the compulsory license for imported signals was imposed.

Since the passage of §111 of the Copyright Act in 1976, several developments have occurred in the cable television industry which affect, either directly or indirectly, the compulsory licensing mechanism for secondary transmissions.

1. Satellite Transmissions. Changes in FCC rules governing the registration of television receive-only earth stations (TVRO's) and technological advances have led to a proliferation of programming networks distributed to cable systems via satellite. Although three satellite program-carrying signals are further transmissions of over-the-air television broadcast signals (WGN, WOR, and WTBS), a majority of the signals transmitted contain nonbroadcast, original programming (Cable News Network, USA Network, MTV, ESPN, Home Box Office, Showtime, etc.). Such nonbroadcast material is subject to full copyright liability; hence, cable systems acquire and pay for such programming by negotiation and contract, unassisted by a compulsory license. Satellite technology has enormously increased the diversity of programming available to the cable subscribers, but retransmitted broadcast signals, local and distant,

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remain the mainstay of cable programming. In recent years, however, pay programming has expanded at a rate more rapid than that of basic cable service.

2. FCC Deregulation of the Cable Television Industry. As part of its policy of deregulation, the FCC has eliminated from its regulations: 1) restrictions on the number of distant signals that may be carried by a cable system; and 2) protection afforded to program suppliers under its syndicated program exclusivity rules. The Copyright Act permits the Copyright Royalty Tribunal, in the case of a change in the FCC rules, to adjust the royalty rate schedule governing carriage of the newly permitted signals and syndicated programming. The recent CRT adjustment in response to these changes, presently contested in a case before the Court of Appeals for the District of Columbia, is discussed later.

3. Copyright Office.

Collection of Royalties: Under the statute, cable systems deposit their compulsory license royalty fees with the Copyright Office on a semi-annual basis. The following table indicates the amount of royalties received:

January-June 1978	$ 6,182,530.60
July-December 1978	$ 6,719,379.42
January-June 1979	$ 7,557,014.65
July-December 1979	$ 8,309,918.02
January-June 1980	$ 9,686,172.66
July-December 1980	$10,227,474.44
January-June 1981	$12,076,401.62
July-December 1981	$14,223,237.49
January-June 1982	$16,550,866.55

Data concerning the accounting period July-December 1982 is incomplete since royalties for that period did not have to be deposited until March 1 of this year.

4. Copyright Royalty Tribunal.

a. Distribution of Royalties: Every year, the CRT distributes the cable royalties plus accumulated interest to qualified copyright owners. In

its most recent decision, published in the Federal Register of December 28, 1982, the CRT announced the following distribution of 1980 cable royalties:

1. Motion Picture Association of America and other program syndicators including claimants for programs syndicated by commercial television 70%
2. Joint Sports Claimants 15%
3. Public Broadcasting Service 5.25%
4. Music Performing Rights Societies 4.50%
5. U.S. Television Broadcasters 4.25%
6. Canadian Claimants (except radio) 0.75%
7. National Public Radio 0.25%

b. Adjustment of the Royalty Rate: Since the compulsory license mechanism became effective in January 1978, the CRT has announced two rate adjustment decisions:

(1) The CRT is authorized to adjust the statutory royalty rate schedule every five years to reflect national monetary inflation or deflation and changes in the average rates charged to cable subscribers for the basic service of providing secondary transmissions. In 1980, the CRT adjusted the cable television royalty rate by 18.35% to reflect such changes. In addition, the CRT raised the small system ceiling (under which "small" cable systems are permitted to pay royalties on a reduced and simplified basis) from $160,000 to $214,000.

(2) The CRT also is authorized to adjust the royalty rate schedule to reflect changes in certain FCC rules. As a result of the FCC deregulation discussed earlier, the CRT made the following adjustments:

A) The CRT added a surcharge ranging between .599% to .089% to the existing rate schedule to compensate copyright owners for the loss of syndicated program exclusivity in the top 100 television markets.

B) The CRT set a royalty rate of 3.75% for carriage of new signals permitted to be carried as a result of the FCC elimination of its distant signal limitations.

5. Legislation in the 97th Congress.

In light of the changed circumstances in the cable industry since 1976, there were extended discussions and legislative activity in the 97th Congress looking to alteration of the cable license:

H.R. 5949: This bill, which passed the House of Representatives but was not considered by the Senate, would have done the following:

* Retain the cable compulsory license;
* Provide for limited syndicated exclusivity protection;
* Codify in modified form FCC Network Non-duplication and "must carry" rules;
* Codify FCC sports exclusivity rules;
* Exempt satellite resale carriers from copyright liability; and
* Exempt small cable systems from copyright liability.

H.R. 3844: This bill would have accomplished the following:

* Impose (after a transition period) full copyright liability for cable secondary transmissions;
* Exempt from copyright liability cable carriage of local signals;
* Exempt from copyright liability cable carriage of necessary distant network programming;
* Subject satellite resale carriers to copyright liability;
* Exempt small cable systems from copyright liability; and
* Eliminate the FCC "must carry" rules.

H.R. 3844 has been reintroduced in this Congress as H.R. 1388.

In the final days of the 97th Congress, Section 143 of P.L. 97-377, 97th Cong., 2d Sess. (1982) was enacted into law. This provision is intended to stay the 3.75% CRT cable royalty rate adjustment for carriage of newly permitted distant signals until March 15, 1983, or a decision by the Court of Appeals on the appeal of the CRT regulation, whichever occurs first. The 3.75% rate adjustment was to become effective January 1, 1983.

D. DISTRIBUTION OF "SUPERSTATION" PROGRAMMING VIA SATELLITE BY RESALE CARRIERS

Section 111(a)(3) of the Copyright Act exempts from copyright liability those secondary transmissions "by any carrier who has no direct or indirect control over the content or selection of the primary transmission, and whose activities with respect to the secondary transmissions consist

solely of providing wires, cables, or other communications channels for the use of others ...." A question has arisen about the applicability of this exemption to the activities of "resale carriers" who distribute the programming of superstations (both willing and unwilling) via satellite. ("Resale carriers" lease transponder time from common carriers such as RCA or Western Union and then provide programming services to cable systems.)

When the Copyright Act was passed in 1976, existing satellite technology was capable of transmitting domestic television programming, but satellite use was confined largely to overseas transmissions. Most cable systems received their distant signals by means of a large central antenna or through microwave relay. The limitations inherent in terrestrial transmissions and the high cost of microwave facilities and equipment effectively barred an independent television station from nationwide distribution. Technology and the Federal Communications Commission later combined to make "superstations" a reality.

A "superstation" typically is an independent television station serving one of the major United States television markets, whose programming (generally syndicated shows, sports, and movies) makes it attractive to audiences in other markets nationwide as well as within the range of its radiated signal. Developments in satellite technology (the greater development of commercial domestic satellites and the lower cost of television receive-only earth stations) and a relaxation of FCC restrictions made such nationwide transmission feasible.

During the last two years, two cases have examined the scope of the "carrier exemption" with respect to resale carriers of independent broadcast television signals. In the first, the U.S. District Court for the Northern District of Illinois held that United Video, Inc., a satellite resale carrier of the signal of WGN in Chicago, had not committed copyright infringement, and had not forfeited exemption from liability under §111(a)(3), by virtue of United Video's deletion of teletext information transmitted by WGN and insertion of other data in lieu thereof. [WGN Continental Broadcasting Company v. United Video, Inc., 523 F. Supp. 403 (N.D. Ill. 1981)] While United Video retransmitted the programming component of the WGN signal in toto and without

substitution, it deleted the teletext information which was encoded in the vertical blanking interval and substituted other information. The District Court held that such deletion and substitution did not violate the conditions for an exemption under §111(a)(3). The Court held further that, even assuming some sort of copyright protection for the teletext information which had been deleted, there had been no "performance" of copyrighted works to the "public" since United Video merely provided the signal to the cable television companies which performed the works. The Copyright Office entered the case at the appellate level as amicus curiae to express its views regarding the "public performance" aspect of the decision. On appeal, the United States Court of Appeals for the Seventh Circuit reversed on both grounds. First, the Court held that the teletext in question was an integral part of the copyrighted program (the 9 O'Clock News) involved and its deletion was an alteration or change impermissible under §111(a)(3). In adopting a "relatedness" test to determine when teletext is covered by the copyright on the main program, the Court stated that WGN's teletext was covered by the copyright on its news program "provided the teletext is intended to be seen by the same viewers as are watching the nine o'clock news, during the same interval of time in which the news is broadcast, and as an integral part of the news program." Second, the Court further held that the delivery of WGN's signal via satellite to cable systems constitutes a public performance of the works embodied in that signal. [WGN Continental Broadcasting Company v. United Video, Inc., 685 F.2d 218 (7th Cir. 1982)]

The second case [Eastern Microwave Inc. v. Doubleday Sports, Inc., 534 F. Supp. 533 (N.D.N.Y. 1982)] concerned the delivery of WOR in New York (which broadcasts New York Mets baseball games, as to which games Doubleday was copyright proprietor) via satellite to cable systems by Eastern Microwave, Inc. (EMI). EMI sought a declaratory judgment that its carriage of WOR was exempt from copyright liability under §111(a)(3). Defendant counter-claimed for copyright infringement. The U.S. District Court for the Northern District of New York, in granting partial summary judgment to defendant, held that EMI's retransmission constituted a public performance of the games in question and, therefore, was subject to copyright liability absent a license or exemp-

tion. The Court further held that EMI failed to qualify as an exempt passive carrier, since EMI exercised control over selection of the signal and because EMI's services were "not limited to providing wires, cables or other communications channels for the use of others, as required...." The Copyright Office entered the case at the appellate level as amicus curiae to support the District Court's ruling with respect to the public performance aspect of the case. On appeal, the Court of Appeals for the Second Circuit found that EMI's choice of the WOR signal was in response to demand for the signal from its cable system "subscribers" who chose that signal over others potentially available and the decision to retransmit the WOR signal did not evidence control by EMI over the content and selection of the primary transmission intended to be precluded by §111(a)(3). Furthermore, the Court concluded that there was no alteration of the signal by EMI and that the record indicated that EMI had never refused a reasonable request for its services. Thus, EMI has not exercised control over the particular recipients of its transmissions. In view of its reversal under §111(a)(3), the Court declined to address the question of public performance. However, the Court did say that the common carriers whose equipment is used to distribute signals to CATV subscribers have a continuing need for the common carrier exemption to avoid liability for communicating to "the public." [Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125 (2d Cir. 1982)]. A petition for certiorari to the United States Supreme Court, filed by Doubleday Sports, Inc., was denied on February 22, 1983.

Legislation was introduced during the 97th Congress to resolve the dispute concerning the applicability of §111(a)(3) to satellite resale carriers. As part of a massive revision of the cable television copyright compulsory license mechanism, H.R. 5949, 97th Cong., 2d Sess. (1982), would have amended §111(a)(3) to read as follows:

> (a) Certain secondary transmissions exempted
>
> The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if —
>
> • • •
>
> (3) the secondary transmission is made by any carrier

> who has no direct or indirect control over the content of the primary transmission or over the ultimate recipients of the secondary transmission, and whose activities with respect to the secondary transmission consist primarily of providing wires, cable, or other communications channels for the use of others: Provided, that the provisions of this clause extend only to the activities of said carrier or like entity with respect to secondary transmissions and do not exempt from liability the activities of others with respect to their own primary or secondary transmissions.

In commenting on this proposal, the relevant Report of the House Committee on the Judiciary states:

> There has never been any doubt by this Committee that carriers are exempt from copyright liability when retransmitting television signals to cable systems via terrestrial microwave or satellite facilities...the committee believes it is useful to clarify the existing language of Section 111(a)(3) by certain technical amendments, thereby restating its intent that the exemption apply to all such carriers. With these changes, qualifying carriers may engage in business promotion and marketing of their services and retransmit one or more television signals via satellite to cable systems pursuant to their FCC tariff without fear of loss of the exemption.

[H.R. Rep. No. 97-559, Part 1, 97th Cong., 2d Sess. (1982) at 5.]

Although this legislation was passed in the House of Representatives, the 97th Congress concluded before any Senate action. A similar bill, S. 2881, 97th Cong., 2d Sess. (1982), relating solely to §111(a)(3), was introduced by Senator Specter. During the 97th Congress, no action was taken on this bill.

E. CONVENTION RELATING TO DISTRIBUTION OF PROGRAMME-CARRYING SIGNALS TRANSMITTED BY SATELLITE (BRUSSELS SATELLITE CONVENTION)

In May 1974, the International Conference of States on the Distribution of Programme-Carrying Signals Transmitted by Satellite was convened jointly by the United Nations Educational, Scientific and Cultural Organization and by the World Intellectual Property Organization. The Conference established the text of the Convention relating to Distribution of Programme-Carrying Signals Transmitted by Satellite (The Brussels Satellite Convention) as well as a report of its work.

States that become a party to the Convention agree generally to take adequate measures to prevent the distribution in or from its territory of any programme-carrying signal by a distributor for whom the signal emitted to or

passing through the satellite is not intended. Satellite signals intended for direct reception by the general public are excluded from the scope of the Convention.

To date, seven states have ratified or acceded to the Convention: Austria, Federal Republic of Germany, Italy, Kenya, Mexico, Nicaragua, and Yugoslavia. Although the United States signed the Convention in 1974, it has not yet been sent to the Senate for ratification.

United States adherence to the Brussels Satellite Convention has been under consideration periodically since the conclusion of the Conference. Until recently, however, domestic private sector support for U.S. ratification of the Brussels Satellite Convention has been meager. Now, widespread use of satellites for the distribution of programming has resulted in increased concern over unauthorized interception and distribution. For example, program material intended for domestic distribution only has been received from U.S. satellites and distributed without authorization or compensation in Belize, Bolivia, Colombia, Costa Rica, Jamaica, and Panama. These developments now have resulted in vigorous private sector support for ratification of the Convention.

Although U.S. ratification of the Convention alone would not stop the activities described above, it would confirm that foreign origination organizations are protected against unauthorized reception and distribution in the United States and would also serve as a model to other nations which look to the United States for guidance in resolving questions raised by new technologies.

F. SEMICONDUCTOR CHIP PROTECTION ACT OF 1983

Late in the 97th Congress, H.R. 7207 and S. 3117 were introduced in the House and Senate respectively to address specifically an issue that has taken on some urgency in recent years: the question of protection for the topography of semiconductor chips. This proposed amendment to the Copyright Act of 1976 was reintroduced in the House of Representatives on January 27, 1983 (H.R. 1028: Mr. Edwards).

The House bill, known as the "Semiconductor Chip Protection Act of 1983," focuses on related images having patterns that represent the layers of semiconductor chip products, and does not explicitly address the scope of copyright in any computer programs or other works that may be embodied in or on such products. The bill would establish a new category of works, designated "mask works," to be included among the works of authorship enumerated in §102(a) of title 17, and would amend that title to define a "mask work" as "a series of related images — (1) having the predetermined, three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product; and (2) in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the semiconductor chip product."

Copyright protection for such mask works would be limited to ten years from the first authorized distribution, use in a commercial product, or manufacture in commercial quantities. Provision is also made for compulsory licensing of mask works, under certain terms and conditions, where a purchaser of a chip is not aware or does not have reasonable grounds for believing that the work is an infringing product.

Whether, and to what extent, the topography of semiconductor chips should be afforded copyright protection was raised in the closing days of CONTU, the National Commission on New Technological Uses of Copyrighted Works. However, as CONTU stated in its Final Report, there was not sufficient time remaining for the Commission to deal with the matter. Further consideration was given to what was termed the "imprinted design patterns on semiconductor chips" during a hearing before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice on April 16, 1979. The legislation then before the Subcommittee was a bill, H.R. 1007, to amend §101 of the copyright law to add the following new sentence at the end of the definition of "Pictorial, graphic, and sculptural works": "Such pictorial, graphic, and sculptural works shall also include the photographic masks used to imprint patterns on integrated circuit chips and include the imprinted patterns themselves even though they are used in connection with the manufacture of, or

incorporated in a useful article."* In this respect, it should be noted that the bill currently under discussion in the House of Representatives takes a very different approach. Section 2 of H.R. 1028 explicitly provides that "Masks and mask works shall not be deemed pictorial, graphic, or sculptural works."

G. REPORT OF THE REGISTER OF COPYRIGHTS ON LIBRARY REPRODUCTION OF COPYRIGHTED WORKS

Section 108(i) of the Copyright Act requires the Register of Copyrights to report to Congress, every five years, on the extent to which §108 of the Act has achieved the intended statutory balance between the rights of creators and the needs of users of copyrighted works. The first of these reports was submitted in January, 1983. In it the Copyright Office discusses the evidence adduced and comments made at several regional hearings, empirical statistical evidence on photocopying practices contained in a contractor's report, the legislative history of §108, various technological and international developments, and the recommendations made by various interested parties concerning possible changes in the law. The report concludes with several statutory and nonstatutory recommendations.

Among the problem areas identified and discussed at some length in the report are questions concerning:

* Eligibility criteria for libraries and archives desiring to avail themselves of §108 privileges.

* The scope of §108 privileges for libraries in for-profit organizations.

* The extent to which certain fundamental principles and rules in section 108 are being understood and followed, including:

  ° The principle that §108 was enacted to make lawful certain copying, in the library environment, which would otherwise violate §106 (in which the right to copy or authorize copying is granted exclusively to the copyright owner) and not be permitted by any other exemption, including section 107 (concerning "fair use").

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* H.R. 1007, 96th Cong., 1st Sess. (1979), reprinted in Copyright Protection for Imprinted Design Patterns on Semiconductor Chips: Hearing on H.R. 1007 before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the Comm. on the Judiciary, 96th Cong., 1st Sess. 3 (1979).

- The clear rule that all copying authorized by §108 must consist of the preparation of no more than one copy at a time.

- The relationship between §§107 and 108.

- The rules in subsections 108(g)(1) and (2) which place a "cap" on section 108 photocopying by forbidding related or concerted copying of which the library is aware (even if such copying consists of the preparation of only one copy) and by forbidding all "systematic" photocopying (again, even if only one copy at a time is prepared) except for certain photocopying in lieu of interlibrary loan.

The report concludes that §108 contains a sound structure for obtaining the desired balance, but that the balance has not been achieved in practice, either because the intent of Congress, as manifested in §108, has not been fully carried out, or because that intent is not clear to all the parties whose behavior lies within this law's ambit. The paramount recommendation contained in the report, which is repeated therein at several junctures, is that the parties would be best served if they could hammer out their differences, as to both legal interpretations and acceptable photocopying practices, in negotiations among themselves. Although little progress was made during a series of meetings at the Copyright Office in 1982, useful accommodations have been reached in the past, particularly when Congress stated plainly that it desired and expected the parties to come to an understanding. This was seen in the creation of the music, classroom, CONTU, and off-air taping (for educational purposes) guidelines. Indeed, two of the Copyright Office's four statutory recommendations involve the endorsement, either in principle or as drafted, of compromises worked out among diverse interests. These were the "umbrella statute," which would encourage publishers and libraries to join in collective organizations which could authorize photocopying beyond the scope of §108 in a simplified large-scale manner, endorsed by the Association of American Publishers and various for-profit entities; and the proposal to permit certain limited copying of music for research purposes, endorsed by the Music Library Association and the Music Publishers Association.

The other statutory recommendations were that the law be made to state clearly that the notice required to be placed on photocopies prepared under the auspices of §108 be the same as the notice required to be placed on

published works, i.e., "Copyright [Copr.] [C in a circle], Owner's Name, Year date of publication," rather than a "warning" that the work "may" be protected by copyright; and that the law be clarified to state that the copying of unpublished works under subsections 108(d) and (e) is forbidden.

The chief nonstatutory recommendations, beyond encouraging voluntary agreements among the parties, were to study various mechanisms for compensating copyright owners for the photocopying of their works. These mechanisms include: surcharges on equipment, sampling techniques, and collective licensing arrangements. In addition, two related recommendations concern the need for further study of new technological issues, and an examination of the complex issues surrounding massive archival preservation projects.

Although the library and publishing communities spent much time immediately after the current copyright law was enacted in advising their members about the rules in §108, the level of understanding in the library community, which is, of course, the situs of the copying governed by the section, appears less than complete. Although certain rules are apparently being looked to, the methods of compliance appear, in some instances, imperfect.

From both the hearings and the statistical surveys, the relationsnip between sections 107 and 108 appears less than well understood, with the scope of fair use "beyond" §108 the subject of widely disparate interpretations. A large amount of the photocopying done in libraries by and for library patrons is done for job-related reasons, rather than for the type of private study, scholarship, or research which the law explicitly favors. Most copyright proprietors who have put their views on the record believe that the present system is not in balance, i.e., that more photocopying should be the subject of permission or payment than the 1.1% which was reported by libraries in 1980. The proscription of "systematic" copying (except for certain interlibrary transactions), appears to mean strikingly different things to different parties. Although the Senate, in its committee report concerning §108, called for negotiations to give meaning to the undefined term (systematic), that has never occurred. In addition, substantial photocopying by libraries (more than 25% of all transactions) of copyrighted library materials consists

of the preparation of two or more copies — a quantity of photocopying which the law does not appear to allow.

If the parties will come together and negotiate in good faith about outstanding issues of deep concern to everyone, then little in the way of amendments to the law should be necessary. Such voluntary arrangements would perforce enjoy wider acceptance than legislatively (or judicially) imposed solutions. They have already been achieved in several areas of copyright. And the Copyright Office believes that an expression in Congress that such voluntary resolutions are desired and expected would have good effect. Failing voluntary resolutions, however, further legislative action may well be required.

ADMINISTRATIVE DEVELOPMENTS

Let me now turn briefly to the administrative condition of the Copyright Office. During my nearly three-year tenure as Register of Copyrights, one of my chief concerns has been to increase the productivity of our staff while maintaining the quality of our services. A GAO study of the Copyright Office, which was reported to us in the fall of 1982, also recommended reduction of Office correspondence, improvement of work flow, and further implementation of data processing within the Office.

We have made substantial progress toward achieving those goals during the past year, resulting in an immediate reduction of 12 staff positions and a projected net reduction of $158,000 in appropriated budget funds for the coming fiscal year.

During fiscal 1982, the Copyright Office made marked gains toward reducing its working inventory to a normal condition, and eliminating the "backlog" of pending registration claims. Workload figures, detailed in the chart of Copyright Office Key Indicators appended to this statement, show a steady decrease in staffing amounting to 19% from fiscal year 1979 to 1982. During the same period, the annual rate of intake has steadily increased, by

17% in FY 1982 over FY 1979; the amount of work completed has increased 8%, and the physical inventory of work on hand has decreased substantially from 150,000 pieces to 106,000.

Despite a loss of 10 trained, professional copyright examiners and an increase of nearly 36,000 claims in fiscal 1982, there was only a small decrease (1%) in the number of certificates issued; and the time expended to process a routine claim was maintained at 3 to 4 weeks. Moreover, owing to an extraordinary effort by the Cataloging Division staff, a 52,000-claim backlog in that Division was eliminated. The over-all backlog of the Office was reduced consequently.

During the past year, we have established a number of objectives to enhance productivity through policy changes, work improvements, automation, and staff development. As work began in each of these areas, the principles of consultative management were applied to ensure staff acceptance of and involvement in changes in old practices and development of new ones.

While descriptions of the administrative condition of the Office tend to focus primarily on registration and recordation related activities, the Copyright Office performs other copyright services for the general public, other agencies, and the Congress. The Licensing Division has since 1978 collected more than 90 million dollars in cable royalties for distribution by the Copyright Royalty Tribunal to copyright owners. The Office responds to numerous requests by letter and telephone for copyright information. Upon request, the Office assists Congressional offices by supplying information, briefing papers, and background studies and by rendering legislative drafting assistance. In January of this year, the report on library reproduction of copyrighted works, consisting of a main volume and seven appendices, was filed with Congress; in July 1981, the Office prepared another major report requested by Congress, concerning the economic effects of the manufacturing clause and its proposed expiration. Finally, the Office actively assists the Department of State in the field of international copyright, providing technical advice and participating in, and often leading, the United States delegations to international meetings.

Policy Changes and Work Improvements

Last year Congress enacted H.R. 4441, which converted the copyright registration fee to a filing fee. That law now allows the Office to retain the fee for unregistered claims rather than refunding it. This permits the Office to retain between $300,000 and $400,000 each year, at present levels, as well as saving substantial administrative expense. In addition, the Office administratively imposed a new fee for special handling services, which we estimate will yield approximately $150,000 of additional revenues each year.

We have commissioned and received from an outside contractor a study of our public information service, and on the basis of its recommendations have effected changes that enable the Public Information Office to accommodate about 700 additional telephone inquiries each week. We have likewise instituted policies to handle many more routine registration problems by telephone, rather than by correspondence. In fact, during the past year, our staff has increased its use of the telephone to resolve minor problems (making over 35,000 such calls), annotating results in the record rather than conducting written correspondence. This has resulted in a reduction, from about 25% to about 20% of all applications, of those cases on which the Office corresponds. And, we have designed more than 20 forms to be used in lieu of individually prepared letters.

Other areas of Office operations have been streamlined for efficiency. For example, accounting procedures have been completely redesigned to enable the Office to maintain currency in accounting operations for the first time in five years.

Automation

The Copyright Office, in collaboration with the Automated Systems Office, of the Library of Congress, replaced the Copyright Card Catalog with an automated catalog on October 1, 1982. This resulted in an immediate reduction of 12 staff positions, saving $225,275 annually. The Office will no longer need to purchase card stock and card cases, or to acquire additional space. Access to copyright catalog information is now available to the staff

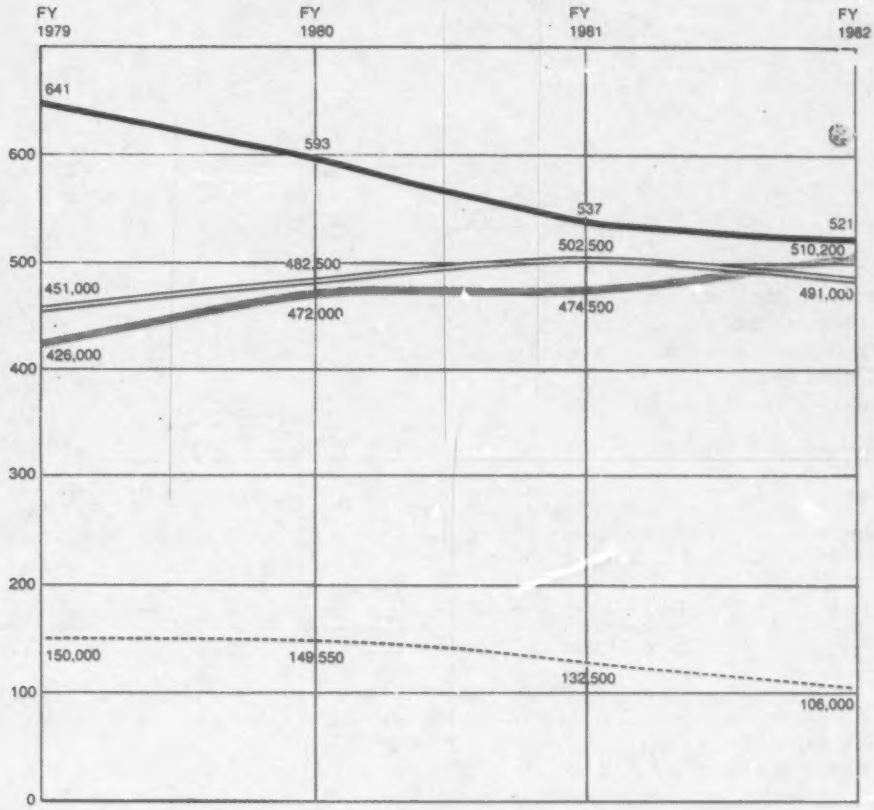
BEST COPY AVAILABLE

and the public through video terminals located throughout the Copyright Office. Work has begun on the final (serials) phase of COPICS retrieval.

Implementation of Phase III of the Copyright Inprocess System, or COINS, is underway. The system's design document envisions a vastly simplified system of recording and processing routine claims and permits close tracking of exceptional cases. The major portion of Phase III, implemented ahead of schedule in late 1982 (thanks to prompt Congressional enactment of H.R. 4441), for the first time allows the Office efficiently to capture by title works submitted by Deposit Account remitters. Access to these items, that represent more than 40% of our annual receipts, gives us increased workload control. Adding these records to those previously controlled through our Correspondence Management System means we are now able to capture 55% of our receipts on line. The remaining records, which are presently captured manually, will be added to COINS III this fall, giving the Office complete item control over all works received.

If you have any questions, I will be pleased to answer them now or in a supplemental statement.

COPYRIGHT OFFICE KEY INDICATORS



STAFFING—19% DECREASE FY 1979 TO FY 1982 (00)

WORK COMPLETED—8% INCREASE FY 1979 TO FY 1982 (000)

RECEIPTS—17% INCREASE FY 1979 to FY 1982 (000)

INVENTORY—29% DECREASE FY 1979 TO FY 1982 (000)

C-732 January 1983

The Register

April 5, 1983

The Honorable
Charles McC. Mathias, Jr.
United States Senate
387 Russell Senate Office
Building
Washington, D.C. 20510

Dear Senator Mathias:

This responds to your letter of March 14, 1983, which asks certain questions as a follow-up to the oversight hearing conducted by your Subcommittee on March 10, 1983.

1. Views on the Section 118 Compulsory License for Pictorial, Graphic, and Sculptural Works

You request my views on the "effectiveness of the compulsory licensing of pictorial, graphic and sculptural works under Section 118 of the Copyright Act of 1976." As you note, the Graphic Artists Guild maintains that the "compulsory license for visual works has not worked in practice and should be dropped to allow free market bargaining . . . ." You ask whether I would support the CRT's recommendation to remove pictorial, graphic, and sculptural works from the section 118 compulsory license.

In general, as I have previously testified, I believe the marketplace is a better mechanism for facilitating commercial dealings concerning copyright than government regulation under a compulsory license. A compulsory license should be adopted only in very exceptional circumstances and as a last resort. When a compulsory licensing system has been adopted, I favor continuing or periodic review to determine whether the original justification for a compulsory license remains valid.

The Copyright Office does not have any evidence from its own work and experience regarding the continuing necessity for the section 118 pictorial-graphic-sculptural work compulsory license. As you are aware, however, the Copyright Royalty Tribunal has made a study of that issue and concluded that this compulsory license, if justified originally, has proved either unnecessary or unworkable. Congressional hearings would provide an opportunity to examine the conclusion of the Copyright Royalty Tribunal in view of its study and an experience of over five years since the effective date of the compulsory license. The section 118 license also covers nondramatic musical works, as well as pictorial-graphic-sculptural works, and should probably be included in any such review.

2. Time for Processing Claims to Copyright

Senator Hatch inquires about the average time for processing claims to copyright, and asks that I elaborate on the GAO's 1981 conclusions and how processing time has been reduced.

In 1981, when the GAO was conducting its audit, the Copyright Office had reached the end of a period of high backlogs resulting from the fundamentally revised copyright statute, which went into effect in 1978, requiring numerous changes in Copyright Office forms and procedures, which in turn required a period of familiarization and adjustment for both the public and Copyright Office personnel. We have, nevertheless, now reduced the average time for processing to 3-4 weeks. Achieving this goal of 3 to 4 weeks was accomplished by putting into effect about 100 workflow improvements in the units involved in the registration process. Many of these resulted from numerous discussions among the staff, and others were the result of policy changes and a heightened awareness on the part of the supervisors in controlling leave abuse and motivating their staffs. Wherever possible, experienced staff have been temporarily assigned from their own unit to other, heavily-backlogged units.

The time to process a routine claim (that is, one for which a certificate is issued with no problems necessitating correspondence with the remitter) has fluctuated over the years from over 6 weeks to as low as 3 weeks because of a number of circumstances, some of which are temporary and some of which have a long-term impact. For example, staff turnover is a significant factor; it takes more than a year to train a copyright examiner who, when fully trained, can process about 10,000 claims per year, and the Office has lost a number of examiners recently. The continuous increase in claims received each year is by its nature a long-term impact to which the various processing units must adjust. Heavy annual-leave taking during holiday periods in addition to loss of time due to inclement weather results in seasonal fluctuations.

The Copyright Office has mounted a continuing program, still in development, for improvements in work methods which we expect to yield further productivity gains. The objective of the Office is with these gains to accommodate steadily rising workload, to the extent possible, as an alternative to large staff increases — as we have been able to do in the last two fiscal years.

3. 1982 Overtime Costs

Senator Hatch next inquires about our overtime costs for fiscal 1982 and asks whether overtime was used to eliminate the Cataloging Division backlog.

No overtime money was spent to eliminate the Cataloging Division's backlog.

Overtime expenditure in fiscal year 1982 was $11,183. Approximately $9,000 of that total was spent moving the copyright deposits collection from the former Pickett Street Annex in Virginia to the Landover storage facility in Maryland. The remainder was overtime incurred in specific services requested by the public

to make copies of copyrighted works and related records for litigation purposes, and paid for by the parties requesting these services.

The Copyright Office now, as a matter of policy, discourages the use of overtime on a regular basis, but it is, of course, unavoidable from time to time.

4. Domestic Implications of Brussels Satellite Convention

Senator Hatch also requests my comments regarding the domestic implications of U.S. ratification of the Brussels Satellite Convention.

The Brussels Satellite Convention was developed to prevent piracy of program-carrying signals transmitted via satellite (other than those satellite transmissions intended for direct reception by the general public). The Convention does not cover the interception (without distribution) of program-carrying satellite signals by individual home earth station owners.

A country which becomes a party thereto is obligated to take "adequate measures" to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended. This obligation may be satisfied under copyright, communications, or neighboring rights laws, or by administrative, penal, or other laws.

The Convention specifically states that it shall not be interpreted to limit the protection of authors, performers, producers of phonograms, or broadcasting organizations, under any domestic law or international agreement. Existing rights of these groups would therefore be unaffected by U.S. ratification.

The Executive Committee of the National Association of Broadcasters has recently adopted a position supporting U.S. ratification. Domestic broadcasters support ratification apparently because they believe it will provide some protection against piracy of satellite signals and encourage other nations to ratify the Convention. Without this protection, authorized broadcasters may be pressured by program suppliers to pay for unauthorized distributions which the broadcaster cannot stop and which do not benefit the authorized broadcaster. If the broadcaster refuses to pay for rights in territories where unauthorized interceptions and distributions occur, the program supplier may refuse to grant a license for the original transmission.

Proprietors of transmission programming presumably support U.S. ratification in order to protect their ability to sell programming on a market-by-market or nation-by-nation basis. Only be assuring such exclusivity can program suppliers obtain full compensation for the exploitation of their works.

Domestic satellite carriers may support U.S. ratification to make more secure and marketable the transmission services that they offer.

During this year, the American Bar Association Section on Patent, Trademark and Copyright Law will consider a resolution to support U.S. ratification. The Convention also has been endorsed by the National Telecommunications and Information Administration of the Department of Commerce in its recent Outline for United States Policy in International Telecommunications and Information.

The Copyright Office, other government agencies, and private sector representatives have been examining the question whether 605 of title 47 of the United States Code, taken together with the provisions of our copyright law, would satisfy our obligations under the Convention, or whether implementing legislation would be required. At least one court has held, in a decision on a motion for preliminary injunction, that the unauthorized interception and distribution of a satellite signal violates 47 U.S.C. 605. Rainbow Programming Services Co. v. Hirabbai R. Patel, et al, d/b/a Circle Motor Lodge, PCA NO. 82-6009 (N.D. Fla., November 18, 1982).

5. Copyright Liability of Resale Carriers

Senator Hatch requests my views regarding "the copyright liability of resale carriers who distribute programming by satellites, in light of the statement in the House Report on H.R. 5949 that it was the intent of Congress to exempt such carriers from liability?"

In testimony before the Senate in the 97th Congress on the subject of cable retransmission of copyrighted works, the Copyright Office reiterated the position stated by my predecessor, Barbara Ringer, in testimony before the House in 1979, that section 111(a)(3) of the Copyright Act — the so-called "passive carrier" exemption — should be amended to clarify that satellite resale carriers are not exempt from copyright liability.

Since my testimony was given, the Second Circuit has held that at least one satellite resale carrier is exempt from copyright liability on the ground that the carrier merely responded to the expressed choice of its cable system "subscribers" who chose the signal rather than the carrier. Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F. 2d 125 (2d Cir. 1982, cert. den. Feb. 22, 1983.) On the other hand, the Seventh Circuit has held that another satellite resale carrier was subject to full copyright liability because it deleted some teletext data from the retransmitted signal and thereby exercised control over the content of the program — an act which removed the carrier from the 111(a)(3) exemption. WGN Continental Broadcasting Co. v. United Video, Inc., 685 F. 2d 218 (7th Cir. 1982).

Before the Second Circuit reached its decision in Eastern Microwave, the House reported a cable television bill (H.R. 5949). The Committee report on that bill, as Senator Hatch noted, contained comments to the effect that when the Congress in 1976 passed the current Copyright Act, it was not the intention to subject satellite resale carriers to full copyright liability.

My view is that the continuing controversy surrounding the copyright liability of satellite resale carrier merits Congres-

sional clarification through amendment of the Copyright Act. If this question is reexamined by the Congress, an opportunity will be provided for examining the role of satellite resale carriers, not only in the domestic distribution of copyrighted programs, but also in the international arena. There are serious and growing problems of unauthorized and uncompensated interceptions and distributions of copyrighted programs in some foreign countries with disturbing effects on American copyright interests.

6. Continuation of a compulsory license mechanism.

Finally, Senator Hatch requests my views about the "continuing justification for the compulsory license mechanism." The particular compulsory license is not identified in the request.

As I discussed earlier in my remarks concerning the section 118 compulsory license for pictorial, graphic and sculptural works, I favor a marketplace approach generally. Compulsory licenses are justified, if at all, only in very exceptional cases. Senator Hatch may be referring specifically to the cable compulsory license, section 111 of the Act. I continue to believe that the cable compulsory license is no longer justifiable. The growth, vitality, and maturation of the cable industry, together with the availability of myriad cable origination services -- whether advertiser supported or pay services -- lead me to the conclusion that the marketplace can regulate cable use of copyrighted works more efficiently and directly than the Copyright Royalty Tribunal and the Copyright Office.

I continue to support elimination of the cable compulsory license, after a transition period to allow adjustment, and with some exemption for small systems and exemptions for all systems for local signals and a full complement of network programming.

Sincerely yours,

David Ladd

David Ladd
Register of Copyrights

Senator MATHIAS. Mr. Ray, would you like to come forward with your group; we would be happy to have you proceed in anyway you wish. We will include your statement in full in the record as if read.

STATEMENT OF COMMISSIONER EDWARD W. RAY, CHAIRMAN, COPYRIGHT ROYALTY TRIBUNAL, WASHINGTON, D.C., ACCOMPANIED BY COMMISSIONER THOMAS C. BRENNAN; COMMISSIONER DOUGLAS E. COULTER; COMMISSIONER MARY LOU BURG; AND COMMISSIONER KATHERINE D. ORTEGA

Commissioner RAY. Thank you, Mr. Chairman.

I do not have a preliminary statement. You have received my prepared report for the record, which is a detailed report about the creation, the operation, and some of the activities of the Copyright Royalty Tribunal.

We are pleased to appear before you in order to present testimony to this subcommittee on the operation of the Copyright Royalty Tribunal. Appearing with me today are the other four Commissioners: Commissioner Thomas C. Brennan, Commission Douglas E. Coulter, Commissioner Mary Lou Burg, and Commissioner Katherine D. Ortega.

At this point, as I previously said, I would like to submit the entire report for the record and we are available for any questions that you may have.

Senator MATHIAS. Without objection, your report has been included as part of the record.

We appreciate the full team being present. It gives us a chance to get the sense of how each and all of you collectively feel about how new and innovative operations are working out in practice. We sit here in Congress and hope for the best, but sometimes we never really find out whether the best has occurred or not; whether ideas that are debated here and belabored over actually in practice turn out to be the solution to the problems that they were intended to address.

One question that arises is whether or not the tribunal has all of the equipment that it needs. By equipment, I mean all of the legal authority that you need. You have been through some stormy issues in the recent past.

Did you feel at any point that you did not have sufficient authority, for example, such as subpena power? Do you feel subpena powers are necessary for your operation?

Commissioner RAY. Mr. Chairman, it is my understanding that the tribunal, prior to my joining it, has testified before several committees and, in general, has supported the GAO report of which the subpena power was one, I believe, of the recommendations made by the GAO.

I think presently the tribunal still feels that the subpena power is very necessary.

Senator MATHIAS. Let me invite the other members to comment as they choose.

Commissioner BRENNAN. I fully concur with the chairman's recommendation. I found it a great disadvantage in several rate pro-

ceedings to be denied the opportunity to seek what I regarded as relevant evidence in those proceedings.

Senator MATHIAS. The Commissioner has referred to the recommendations of the General Accounting Office, one of which was that the number of Commissioners should be reduced from five to three.

Commissioner RAY. Mr. Chairman, you will find our recommendation for restructuring the tribunal in our prepared statement. The tribunal has advised several committees in the past that they support the GAO's recommendation that the tribunal be reduced from five to three Commissioners and, at the present time, the tribunal still supports that position.

Commissioner BURG. Senator, that was, indeed, in our recommendation to the GAO. Prior to speaking to the GAO, we recommended a restructuring of from five to three Commissioners to Chairman Kastenmeier.

Senator MATHIAS. I notice that that is conditioned on no new responsibilities.

Commissioner BURG. That is correct.

Senator MATHIAS. If you got the Betamax problem tossed to you, would you feel that would constitute new responsibilities?

Commissioner RAY. I think that is an issue we would have to study very closely, sir.

Senator MATHIAS. I would think there is a good deal of work in that possibility.

Commissioner RAY. I might add voluntarily here, and speaking only as one Commissioner and not representing the tribunal as Chairman, it is my understanding that from time to time the workload at the tribunal has not been that great. I became a member of the tribunal 1 year ago, and it has proved a very extraordinary year because of the one proceeding, because of the FCC deregulation, so it has been an extraordinarily busy year. There has been a tremendous amount of work.

Senator MATHIAS. Another recommendation of the GAO report was the fair distribution of royalty payments decided by the tribunal within 30 days. Were there any problems that you have with that recommendation?

Commissioner RAY. Of rendering a final decision within 30 days?

Senator MATHIAS. Full distribution of the payments.

Commissioner RAY. That could be done if there are no appeals, but the act, of course, itself provides for appeal.

Senator MATHIAS. That, obviously, would stay the payment, but what has been the practice? How long has been the delay in the absence of objections?

Commissioner RAY. If I am incorrect, one of the Commissioners can please correct me.

Each of the distributions has been appealed.

Commissioner BRENNAN. We have chosen, Mr. Chairman, despite the appeals, to make partial distribution reserve a portion of the royalty fund in escrow to accommodate any possible appellate adjustment.

Senator MATHIAS. Are there any kinds of mechanical problems that would get in the way of prompt payment in the absence of appeal?

Commissioner BRENNAN. Initially, yes, but after some years' experience, I believe those are being resolved. We have established criteria, and the claimant generally knows the procedures and the ground rules.

Senator MATHIAS. GAO recommended personnel assistance to you in two respects: first, that you have access to general counsel, and second, that you have adequate funding to acquire expert advice whenever you need it.

Are these matters any one of the Commissioners has any doubts about?

Commissioner RAY. I would like to comment on that, Mr. Chairman, and then let the Commissioners comment.

It is my understanding that the tribunal, in its past testimony, has not felt the necessity for legal or general legal counsel. I believe that may be the position today.

However, personally, as a Commissioner and not as Chairman, I do support the need for general counsel.

Commissioner BURG. Senator, I would like to add something to that.

We said in the past we did not find it necessary to engage a full-time legal counsel. I think that is still the position of the majority of the Commissioners.

However, we wanted the door left open so that we could borrow legal counsel when the workload or when the cases demanded that.

Senator MATHIAS. I can personally see no problem with that.

We frequently have a situation with committees in Congress where we need some expert legal advice, and we retain the services of lawyers with given expertise or particular experience. It can be done on a part-time basis so they are available when you need them.

What about funding for experts? Do you need some adjustment in your budget authorization on that?

Commissioner RAY. I believe not at this point, sir.

Senator MATHIAS. I have really just one final question, and that is on the subject of whether or not the President should be limited in appointments to the tribunal as GAO recommended—"to those knowledgeable in matters related to copyright."

Commissioner BRENNAN. Commissioner Burg had occasion to respond to that recommendation once before. I am sure she will give you her view on that.

Commissioner BURG. With all due respect to Commissioner Brennan who is both a lawyer and has a background in copyright legislation, the rest of us, as you know, did not and do not, outside of the experience we picked up in the past 5½ years. It was my contention then and I still believe that most of the questions, if not all, or all of the issues that we come across, are essentially issues of equity and fairness; and, with all due respect to the law profession, I think other people, honorable people, can make those decisions without being lawyers or without having a copyright background.

Senator MATHIAS. Without prejudging that issue, I might say your conclusion is supported by the general practice that members of the bar normally are excluded from service on juries. There will undoubtedly be other questions from members of the committee who have been called away this afternoon, and, as I announced ear-

lier, we will keep the record open so those questions can be made a part of the record along with your responses.

Let me say one final thing. This is a new enterprise, notwithstanding Mr. Ladd's reminder that there have been copyright committees in the past; but, for the moment, this is a enterprise. We want to look ahead, and we hold our door open to ideas and suggestions you may have, the problems that you see in the area, and for the need of the attention on the part of the Congress.

So don't wait for us to ask you. Let us know.

Commissioner RAY. Mr. Chairman, before we leave, I would like to make a statement I used in a preliminary statement at another subcommittee hearing.

We agree with the observation of Senator Charles Mathias that "if legislation sticks to broad policy issues and keeps out of the nitty-gritty of daily operations, perhaps we won't see our laws overtaken quite so quickly by advancing technology."

Thank you very much, sir.

Senator MATHIAS. Thank you.

[The prepared statement of Mr. Ray, along with subsequent responses to additional questions of Senators Mathias, Hatch, and DeConcini, follows:]

PREPARED STATEMENT OF THE COPYRIGHT ROYALTY TRIBUNAL
PRESENTED BY COMMISSIONER EDWARD RAY

Mr. Chairman:

My name is Edward (Eddie) Ray, Chairman of the Copyright Royalty Tribunal. Appearing with me are Commissioners Thomas C. Brennan, Douglas E. Coulter, Mary Lou Burg, and Katherine D. Ortega. We are pleased to appear before you in order to present this subcommittee testimony on the operations of the Copyright Royalty Tribunal. A detailed report of the Tribunal's activities is submitted as part of this record.

CREATION AND MEMBERSHIP

The Copyright Royalty Tribunal (Tribunal) was created by section 801(a) of Public Law 94-553, an Act for the General Revision of the Copyright Law (title 17 of the United States Code). This legislation was signed by President Gerald R. Ford on October 19, 1976. While the new Copyright Act generally became effective on January 1, 1978, the section of the Act establishing the Tribunal became effective on the enactment date.

The Tribunal is composed of five commissioners appointed by the President with the advice and consent of the Senate for a term of seven years each, except that two of the commissioners first appointed served for a term of five years. The members of the Tribunal are:

Thomas C. Brennan of New Jersey (Term expires September 1984)

Douglas E. Coulter of New Hampshire (Term expires September 1984)

Mary Lou Burg of Wisconsin (Term expires September 1984)

Edward W. Ray of California, Chairman (Term expires September 1989)

Katherine D. Ortega of New Mexico (Term expires September 1989)

STATUTORY RESPONSIBILITIES

The Tribunal's statutory responsibilities are:

(a) to make determinations concerning copyright royalty rates (1) in the area of cable television (17 U.S.C.111), (2) for phonorecords (17 U.S.C. 115), (3) for coin-operated phonorecord players (jukeboxes) (17 U.S.C.116), and (4) for non-commercial broadcasting (17 U.S.C.118); and,

(b) to distribute cable television and jukebox royalties deposited with the Register of Copyrights (17 U.S.C.111 and 17 U.S.C.116).

GENERAL ADMINISTRATION

The only staff of the Tribunal is a personal assistant to each commissioner. The agency does not have a General Counsel and the commissioners perform all professional responsibilities themselves.

The Library of Congress, by contract, provides the Tribunal with administrative services relating to budgeting, accounting, financial reporting, personnel and procurement.

RULEMAKING POLICIES

The Tribunal is acquainted with and endorses the desire of the President and the Congress that rules and regulations adopted by agencies of the Federal Government should be concise, drafted in understandable language, and limited in scope to that which is essential to accomplish the purposes of the agency. Consequently, in its various rulemaking activities, the Tribunal has sought to implement these objectives.

BIOGRAPHICAL SKETCHES

COMMISSIONER EDWARD (EDDIE) W. RAY

Edward W. Ray was born in Franklin, North Carolina and has lived in Los Angeles, California for most of his life. He received an AA degree in business administration from Los Angeles City College and a bachelor of professional studies (major in commercial music and media communications) from Memphis State University. He completed an advanced real estate certificate in appraisals, marketing, finance and taxation from UCLA and Los Angeles City College.

He has had a successful professional career as a music/entertainment executive in Hollywood, California and Memphis, Tennessee. During his career, he served as vice president for Capitol Records, Inc., MGM Records, Inc., Pierre Cassette/Burt Sugarman Television Production Company and was president of Eddie Ray Enterprises.

He has been involved in the development of successful recording careers for many artists including Fats Domino, Rick Nelson, The Osmonds, Sammy Davis, Jr., Mel Tillis and Kenny Rogers.

He founded and operated a commercial music school, The Tennessee College for Recording Arts, as a division of Eddie Ray Music Enterprises.

He was nominated by President Ronald W. Reagan as a commissioner of the Copyright Royalty Tribunal.

COMMISSIONER THOMAS C. BRENNAN

Thomas C. Brennan is a life-long resident of New Jersey. He graduated magna cum laude from Seton Hall University and received his J.D. and LL.M. degrees from Georgetown University. He had a long association with the United States Senate Committee on the Judiciary, principally as Chief Counsel of the Subcommittee on Patents, Trademarks and Copyrights. He was nominated by President Jimmy Carter as the senior commissioner of the Copyright Royalty Tribunal, and was the first Chairman of the Tribunal.

COMMISSIONER DOUGLAS E. COULTER

Harvard University, B.A., Phi Beta Kappa, 1963; European M.B.A., 1970; Harvard Business School, M.B.A., 1971; served in the U.S. Army Special Forces, 1964-67; assistant to the director of finance, AMP de France, Inc., 1969; campaign staff, McGovern presidential campaign, 1971-1972; free-lance writer, 1973-1976; campaign staff, Carter presidential campaign, 1976.

COMMISSIONER MARY LOU BURG

Mary Lou Burg, Commissioner, Copyright Royalty Tribunal, University of Wisconsin, B.S., 1952; General Manager and Sales Manager, radio station WYLO, Wisconsin, 1967-1970; Sales Representative, WYLO, 1964-1967. Director of Continuity and Public Service, WEMP, Wisconsin, 1958-1964; Direct Mail advertising copywriter, Clayton Davis Associates, 1957-1958; Sales and program promotion writer, WXIX-TV, Wisconsin, 1955-1957; Commercial Writer, Erwin-Wasey Advertising Agency, Los Angeles, 1953-1954. Served as Vice Chairman and Deputy Chairman, Democratic National Committee, 1970-1977.

COMMISSIONER KATHERINE D. ORTEGA

Katherine D. Ortega is a native of New Mexico. She was graduated with Honors from Eastern New Mexico University, B.A. in Business Administration and Economics. She was associated with Otero Savings & Loan Association in Alamogordo, New Mexico. She is a Certified Public Accountant and was tax supervisor with Peat, Marwick, Mitchel & Co. in Los Angeles, California. She served as Vice President and Cashier of Pan American National Bank in Los Angeles and later as President of Santa Ana State Bank in Santa Ana, California.

She was nominated by President Ronald W. Reagan as a commissioner of the Copyright Royalty Tribunal.

CHRISTY BLACKBURN-RODRIGUEZ
Confidential Assistant to Chairman Ray

Christy Blackburn-Rodriguez is a native of San Diego, California. She has over twelve years experience in office administration and fiscal systems management: Administrative Aide for Product Development, National Clearinghouse for Bilingual Education; Office Manager for Veterans Affairs Office, Long Beach City College; Fiscal Officer, Rod-San & Associates, Inc.; Confidential Assistant to Commissioner Frances Garcia, Copyright Royalty Tribunal. She presently serves as Confidential Assistant to Commissioner Edward W. Ray, Chairman of the Copyright Royalty Tribunal, with specific responsibility for fiscal operations and record keeping systems, payroll and personnel, and procurement.

NANCY LANGLEY
Confidential Assistant to Commissioner Brennan

16 years office experience. General Law, H.L. Chozick, Secretary to General Counsel, Senate Subcommittee on Patents, Trademarks & Copyrights; Administrative Staff Assistant to Senator John L. McClellan; Transition Officer, Copyright Royalty Tribunal; Confidential Assistant to Commissioner Thomas C. Brennan, Copyright Royalty Tribunal.

BARBARA N. GRAY
Confidential Assistant to Commissioner Coulter

Barbara N. Gray has 19 years administrative experience in government and private industry. Prior to joining the staff of the Tribunal, she was executive secretary to the president of The Conservation Foundation (1973-1978); business manager/executive secretary to the Rockfeller Task Force on Land Use and Urban Development (1972-1973); and has worked at the Council on Environmental Quality, Peace Corps, HUD and the Office of Education. Presently, Ms. Gray serves as Confidential Assistant to Commissioner Coulter.

CATHERINE E. CARLISLE
Confidential Assistant to Commissioner Burg

Catherine E. Carlisle has nineteen years experience in the secretarial/administrative field: Four years in the WAVES, two years in private industry with the balance spent assisting senior executives in the Departments of Labor, U.S. Army, U.S. Air Force, the General Services Administration, Bureau of the Census, and the National Institute of Education.

In 1972, she was awarded the Department of Commerce Special Achievement Award and in 1974 received the National Institute of Education Quality Increase.

Mrs. Carlisle currently serves as Confidential Assistant to Commissioner Burg.

JANET A. CARVER
Confidential Assistant to Commissioner Ortega

Graduated from the University of Redlands, California, with a B.A. in history and government. Attended the University of Oslo, Norway, Institute for English-Speaking Students on scholarship from the Norwegian parliament.

Served on the staff of U.S. Senator Thomas H. Kuchel, then Minority Whip, after employment with the U.S. Department of State Foreign Service. Recruited, trained and coordinated large groups of volunteers for local community organizations over a 17 year period. Mrs. Carver has ten years experience in the secretarial-administrative field. Supervised the Alexandria, Virginia office for the 1980 Census as district manager. She currently serves as Confidential Assistant to Commissioner Katherine Ortega.

TRIBUNAL PROCEEDINGS COMPLETED
IN FISCAL YEARS 1982 AND 1983

1. 1978 Cable Royalty Distribution Proceeding (CRT Docket No. 79-1)
2. Coin Operated Phonorecords: Jukebox Royalty Adjustment Proceeding (CRT Docket No. 80-1)
3. Compulsory License for Secondary Transmission by Cable Systems: Royalty Adjustment Proceeding (CRT Docket No. 80-3)
4. Compulsory License for Making and Distributing Phonorecords: Royalty Adjustment Proceeding (CRT Docket No. 80-2)
5. Coin-Operated Phonorecord Players 1979 Distribution Proceeding (CRT Docket No. 80-5)
6. 1979 Cable Royalty Distribution Proceeding (CRT Docket No. 80-4)
7. Adjustment of the Royalty Rate for Cable Systems; Federal Communication Commission's Deregulation of the Cable Distant Signals and Exclusivity Syndication Rules (CRT Docket 81-2)
8. 1982 Adjustment of the Royalty Schedule for Use of Certain Copyrighted Works in Connection With Noncommercial Broadcasting (CRT Docket No. 82-2)
9. 1981 Jukebox Royalty Distribution Proceeding (CRT Docket No. 82-3)

TRIBUNAL PROCEEDINGS CURRENTLY IN PROGRESS AND/OR
SCHEDULED FOR FISCAL YEARS 1983 AND 1984

1. 1980 Cable Royalty Distribution Proceeding (CRT Docket No. 81-1)
2. 1981 Cable Royalty Distribution Proceeding (CRT Docket No. 82-1)
3. 1982 Jukebox Royalty Distribution Proceeding
4. 1983 Jukebox Royalty Distribution Proceeding
5. 1982 Cable Royalty Distribution Proceeding

U.S. COURT OF APPEALS DECISIONS RENDERED ON RULES AND DETERMINATIONS OF THE COPYRIGHT ROYALTY TRIBUNAL

1. 1978 Cable Royalty Distribution Proceeding - On April 9, 1982, the Court affirmed the Tribunal's royalty allocations.

2. Coin-Operated Phonorecords: Jukebox Royalty Adjustment Proceeding - On April 16, 1982, the Court issued its decision upholding the Tribunal's determination in the proceeding.

3. Compulsory License for Secondary Transmissions by Cable Systems: Royalty Adjustment Proceeding - On September 10, 1982, the Court affirmed the Tribunal's decision.

4. Compulsory License for Making and Distributing Phonorecords Royalty Adjustment Proceeding - On June 18, 1981, the Court upheld the Tribunal's decision on the rate adjustment. However, the mechanism used for interim adjustments was remanded to the Tribunal and subsequently resolved.

TRIBUNAL DETERMINATIONS CURRENTLY IN APPEAL

1. 1979 Cable Royalty Distribution Proceeding (CRT Docket No. 80-4)

2. Adjustment of the Royalty Rate for Cable Systems; Federal Communications Commission's Deregulation of the Cable Industry (CRT Docket No. 81-2)

FINANCIAL STATEMENTS OF THE JUKEBOX ROYALTY FEES FUNDS

The financial statements, as of January 31, 1983, for the 1981 and 1982 Jukebox Royalty Fees Funds follow:

Jukebox Royalty Fees for 1981

Royalty fees deposited	$1,078,966.90	
Interest income	183,761.26	
Gain on matured securities	37,675.71	$1,300,403.87
LESS: Operating cost	$ 115,432.00	
Refunds issued	1,721.90	
Distribution of fees	1,182,813.97	$1,299,967.87
Balance on hand 1/31/83		$ 436.00

Jukebox Royalty Fees for 1982

Royalty fees deposited	$2,763,229.86	
Interest income	227,200.00	
Gain on matured securities	1,518.14	$2,991,948.00
LESS: Operating cost	$ 149,867.00	
Refunds issued	1,918.00	
Cost of investments	2,819,461.84	$2,971,246.84
Balance on hand 1/31/83		$ 20,701.16
Face amount of securities due 9/30/83		2,620,000.00
Estimated interest income due 9/30/83		411,200.00
AVAILABLE FOR DISTRIBUTION ON 9/30/83		$3,051,901.16

FINANCIAL STATEMENTS OF THE CABLE ROYALTY FEES FUNDS

The financial statements, as of January 31, 1983, for the 1978 through 1982 Cable Royalty Fees Funds follow:

Cable TV Royalty Fees for 1978

Royalty fees deposited	$12,905,397.11	
Interest income	426,153.13	
Gain on matured securities	4,730,114.98	$18,061,665.22
LESS: Operating costs	$ 215,403.72	
Estimated CRT expense	28,429.41	
Refunds issued	160,726.44	
Cost of investment	49,031.86	
CRT distribution of fees	17,597,475.48	$18,051,066.91
Balance on hand 1/31/83		$ 10,598.31
Face amount of securities due 3/17/83		50,000.00
AVAILABLE FOR DISTRIBUTION ON 3/17/83		$ 60,598.31

Cable TV Royalty Fees for 1979

Royalty fees deposited	$15,869,573.83	
Interest income	1,785,083.13	
Gain on matured securities	4,958,801.45	$22,613,458.42
LESS: Operating costs	273,218.00	
Refunds issued	116,672.04	
Cost of investments	11,447,817.22	
Estimated CRT expense	52,762.10	
Distribution of fees	10,673,380.66	$22,563,850.02
Balance on hand 1/31/83		$ 49,608.40
Face amount of securities due 3/31/83		11,685,000.00
AVAILABLE FOR DISTRIBUTION ON 3/31/83		$11,734,608.40

Cable TV Royalty Fees for 1980

Royalty fees deposited	$19,896,294.55	
Interest income	528,412.50	
Gain on matured securities	4,592,317.62	$25,017,024.67
LESS: Operating costs	$ 323,950.00	
Refunds issued	59,118.36	
Cost of investments	24,591,582.47	
Estimated CRT expense	9,500.00	$24,984,150.83
Balance on hand 1/31/83		$ 32,873.84
Face amount of securities due 2/3/83		25,950,000.00
AVAILABLE FOR DISTRIBUTION ON 2/3/83		$25,982,873.84

Cable TV Royalty Fees for 1981

Royalty fees deposited	$26,261,959.42	
Interest income	191,656.26	
Gain on matured securities	2,385,327.16	$28,838,942.84
LESS: Operating cost	$ 355,916.00	
Refunds issued	64,099.63	
Cost of investments	28,256,399.88	$28,676,415.51
Balance on hand 1/31/83		$ 162,527.33
Face amount of securities due 2/10/83		29,840,000.00
AVAILABLE FOR DISTRIBUTION ON 2/10/83		$30,002,527.33

Cable TV Royalty Fees for 1982

Royalty fees deposited	$16,528,628.01	$16,528,628.01
LESS: Operating cost	$ 374,667.00	
Refunds issued	1,772.19	
Cost of investments	15,953,788.88	$16,330,228.07
Balance on hand 1/31/83		$ 198,399.94
Face amount of securities due 8/31/83		15,220,000.00
Estimated interest income due 8/31/83		2,444,812.50
AVAILABLE FOR DISTRIBUTION ON 8/31/83		$17,863,212.44

BUDGET APPROPRIATION AND REQUESTS

Fiscal Year 1983:

The Tribunal's authorized budget for fiscal year 1983 is as follows:

Salaries	$415,600
Personnel Benefits	38,400
Travel and Transportation	500
Postage	1,000
Local Telephone	2,500
Long Distance Telephone	1,200
Rental of Equipment	300
Rental of Space	56,000
Printing, Forms	25,000
Services of Other Agencies	15,000
Repair of Equipment	2,200
Cost of Hearings	46,000
Office Supplies	1,000
Books and Library Materials	1,000
Total FY 1983 Authorization	$606,000
Less Reimbursement	157,000*
TOTAL APPROPRIATION	$449,000

*For CRT expenses to be reinbursed from royalty fee accounts.

Request for Fiscal Year 1983 Supplemental Funds:

The Tribunal appeared before the House Appropriations Subcommittee on March 1, 1983 and requested an additional $35,000 pay supplement, due to the legislation adjusting the cost of living scales for the staff and the Executive Pay Cap for the commissioners. A date has not been

scheduled for the Tribunal to appear before the Senate Appropriations Subcommittee.

Budget Request for Fiscal Year 1984:

The Tribunal appeared before the House Appropriations Subcommittee on March 1, 1983 to justify the FY 1984 budget request. The Tribunal is requesting a budget appropriation of $650,000, of which $170,000 shall be derived from the appropriation "Payments to Copyright Owners" for the reasonable costs incurred in proceedings involving distribution of royalty fees. The $9,000 increase over the FY 1983 budget, including the pending supplemental request for payroll expenses, is solely necessitated by the annualization of both the 4% cost of living payroll increase for staff members and the pay cap increase for the commissioners.

A detailed breakdown of the Tribunal's budget request for FY 1984 follows:

COPYRIGHT ROYALTY TRIBUNAL

		FY 1983	Increase	FY 1984
11.1	Salaries and Compensation	$445,000	$ 7,000	$452,000
12.1	Personnel Benefits	44,000	2,000	46,000
21	Travel and Transportation	500	-0-	500
23A	Postage	1,000	-0-	1,000
23B	Local Telephone	2,500	-0-	2,500
23C	Long Distance Telephone	1,500	-0-	1,500
23E	Rental of Equipment	300	-0-	300
23F	Rental of Space	56,000	-0-	56,000
24F	Printing, Forms	25,000	-0-	25,000
25D	Services of Other Agencies (Library of Congress)	15,000	-0-	15,000
25G	Repair of Equipment	2,200	-0-	2,200
25K	Cost of Hearings	46,000	-0-	46,000
26A	Office Supplies	1,000	-0-	1,000
31	Books and Library Materials	1,000	-0-	1,000
TOTAL FUNDS REQUIRED		$641,000	$ 9,000	$650,000
Less Transfer from Royalty Funds		-157,000	-13,000	-170,000
TOTAL APPROPRIATION REQUEST		$484,000	$ -4,000	$480,000

COPYRIGHT ROYALTY TRIBUNAL

	Total	Transfer from Royalty Funds	Regular Bill
1983 Regular Bill	$606,000	- $157,000	$449,000
Proposed Supplemental for Pay Riase	35,000		35,000
1983 Adjusted	$641,000	- $157,000	$484,000
1984 Estimate	650,000	- 170,000	480,000
Net Increase	$ 9,000	- $ 13,000	- $ 4,000

Analyses of Increases

	FY 1983	FY 1984	Increase
1. Salaries and Compensation	$489,000	$498,000	$ 9,000

Current level + $9,000

To annualize cost of living and payroll taxes increase $1,000
To annualize Pay Cap increase 8,000

Total Increase ..... $ 9,000

SUMMARY

Total Salaries and Expenses - Copyright Royalty Tribunal	$641,000	$650,000	$ 9,000
Increase in Current Level +$9,000			

RESTRUCTURING OF THE TRIBUNAL

Congressional subcommittees have previously been advised by the Tribunal that it supports the General Accounting Office's recommendations that the Tribunal be reduced from five to three commissioners. The Tribunal currently supports that position, provided no new copyright legislation is enacted that increases the Tribunal's responsibilities. We understand that the legislative committees have considered the implementation of this recommendation, as of January 1, 1985.

THE IMPLEMENTATION OF THE GOVERNMENT AND THE SUNSHINE ACT

The Government in the Sunshine Act requires each agency subject to the Act to report annually to the Congress regarding its compliance with the provisions of the Act. In assembling and organizing the required information, the Tribunal has followed the format and procedure requested by the Chairman of the Senate Subcommittee on Federal Spending Practices and Open Government.

3-5. During fiscal year 1982, the Tribunal held fifty meetings, none of which, in whole or in part, were closed to the public. On one or more occasions, drafts of correspondence prepared by the Chairman or other Commissioners have been circulated to Commissioners for review. However, such correspondence does not constitute official action of the agency. Given the smallness of the agency, we have held no wholly or partially closed meetings.

6. Since its establishment, the Tribunal has never utilized notational voting in the consideration or adoption of agency rules, other final actions, or in reaching the final determinations described in the Copyright Act (P.L. 94-553). As stated above, on one or more occasions, drafts of correspondence prepared by the Chairman or other Commissioners have been circulated to Commissioners for review. However, such correspondence does not constitute official action of the agency.

7. The Tribunal has no permanent professional staff and consequently there are no staff papers to be made available to the public. Section 301.12(c) of the Tribunal's Rules of Procedure provides, "Reasonable access for news media will be provided at all public sessions provided that it does not interfere with the comfort of Commissioners,

staff, or witnesses. Cameras will be admitted only on the authorization of the Chairman, and no witness may be photographed or have his testimony recorded for broadcast if he objects." Since its establishment, the Tribunal has not in practice precluded the use of cameras or recording devices.

8. Three methods of notifying the public of agency meetings have been utilized:

A. Publication of hearing notice in the FEDERAL REGISTER.

B. Informal personal notification of persons known to have an interest in a particular subject matter.

C. Use of the trade press to bring the proceedings of the Tribunal to the attention of persons not likely to read the FEDERAL REGISTER.

The policy of the Tribunal has been to provide at least thirty days notice of the commencement of any proceedings other than proceedings limited to the internal operations of the agency.

9. As stated earlier, the agency is small and all meetings have been open. This question is therefore not applicable.

10-11. The Tribunal's procedure for releasing transcripts, recordings, or minutes of closed meetings is established in Section 301.15 of the Rules of Procedure which provides:

(a) All meetings closed to the public shall be subject to either a complete transcript or, in the case of §301.13(i) and at the Tribunal's discretion, detailed minutes. Detailed minutes shall describe all matters discussed, identify all documents considered, summarize action taken as well as the reasons for it, and record all roll call votes as well as any views expressed.

(b) Such transcripts or minutes shall be kept by the Tribunal for 2 years or 1 year after the conclusion of the proceedings, whichever is later. Any portion of transcripts of meetings which the Chairman does not feel is exempt from disclosure under §301.13 will ordinarily be available to the public within 20 working days of the meeting. Transcripts or minutes of closed meetings will be reviewed by the Chairman at the end of each calendar year and if he feels they may at that time be disclosed, he will resubmit the question to the Tribunal to gain authorization for their disclosure.

12. As we have held no closed meetings, there have been no complaints, formal or informal, of our Sunshine procedures.

13. Section 301.17 of the Tribunal's Rules of Procedure on ex parte communication reads as follows:

(a) No person not employed by the Tribunal and no employee of the Tribunal who performs any investigative function in connection with a Tribunal proceeding shall communicate, directly or indirectly, with any member of the Tribunal or with any employee involved in the decisions of the proceeding, with respect to the merits of any proceeding before the Tribunal or of a factually related proceeding.

(b) No member of the Tribunal and no employee involved in the decision of a proceeding shall communicate, directly or indirectly, with any person not employed by the Tribunal or with any employee of the Tribunal who performs an investigative function in connection with the proceeding, with respect to the merit of any proceeding before the Tribunal or a factually related proceeding.

SUNSHINE ACT MEETINGS

MEETINGS

October 14, 1981	Compulsory License for Making and Distributing Phonorecords: Royalty Adjustment Proceeding
	1980 Cable Royalty Distribution Proceeding
	Adjustment of the Royalty Rate for Cable Systems; FCC Deregulation of the Cable Industry
November 3, 1981	Compulsory License for Making and Distributing Phonorecords: Royalty Adjustment Proceeding
December 15, 1981	Compulsory License for Making and Distributing Phonorecords: Royalty Adjustment Proceeding

1979 Cable Royalty Distribution Proceeding (CRT Docket 80-4):

October 5, 6, 7, 8, 9, 13, 14, 1981

January 15, 19, 20, 21, 22, 25, 26, 27, 28, 1982

February 3, 4, 5, 1982

May 26, 1982

July 14, 21, 1982

1979 Jukebox Distribution Proceeding (CRT Docket 80-5):

October 1, 2, 1981

Adjustment of the Royalty Rate for Cable Systems; FCC Deregulation of the Cable Industry (CRT Docket 81-2):

March 31, 1982

May 11, 1982

June 15, 16, 17, 18, 22, 24, 25, 29, 30, 1982

July 1, 7, 8, 13, 14, 15, 16, 20, 21, 22, 1982

August 3, 4, 5, 6, 1982

1980 Cable Royalty Distribution Proceeding (CRT Docket 81-1):

September 21, 22, 23, 24, 28, 29, 30, 1982

RESPONSES OF COMMISSIONER EDWARD RAY TO QUESTIONS OF SENATORS MATHIAS, HATCH, AND DECONCINI

QUESTIONS SUBMITTED BY SENATOR MATHIAS

Question 1: In your recent cable television rate adjustment proceeding you raised the royalty rate for transmission of distant signals, formerly prohibited by the FCC's rules, to 3.75 percent of a cable system's gross basic subscriber revenues per distant signal equivalent ("DSE"). The Copyright Act directs you to set a "reasonable" rate taking into consideration the interests of both the owners and users of copyrighted works. In your opinion, is the new rate fair to all parties?

Response: Yes, we believe that the rate is fair to all parties based on the evidence presented in the rate proceeding. Our detailed analysis of that evidence is found in the Tribunal's opinion.

It should be noted that in establishing the 3.75 rate the Tribunal made a number of determinations generally favorable to cable operators and adverse to the positions asserted by the copyright owners and broadcasters. The copyright owners and broadcasters maintained that the record evidence justified a rate substantially greater than 3.75. In addition they urged the Tribunal to impose a surcharge on this rate to reflect the elimination of the syndicated exclusivity rule. The Tribunal, however, incorporated its syndicated exclusivity adjustment in the 3.75 rate and refused to impose a surcharge.

The copyright owners and broadcasters proposed that the royalty schedule include a cost of living adjustment mechanism, as had been provided in other rate schedules. The Tribunal rejected this proposal.

The copyright owners and broadcasters strongly urged that the new rate apply as of July 1, 1981 to correspond with the effective date of the FCC deregulation. While there is some logical justification for that position, the Tribunal determined that it would have a major impact on cable operators and consequently resolved that the rate schedule should have no retroactive application.

Question 2: Congress, in fashioning the 1976 Act, carefully sought to avoid including any provisions which might have upset communications policy. The FCC made a clear communications policy decision when it concluded that its distant signal carriage restrictions were no longer in the public interest and that unlimited signal carriage was beneficial. Is the Tribunal decision in keeping with the FCC decision?

Response: Any serious examination of the cable issue must acknowledge that consideration must be given to both communications and copyright policy issues. This general observation does not address the allocation of functions among co-equal agencies of the federal government. This relationship was defined on the House floor in 1976 by Congressman Railsback, who was a leading participant in the resolution of the copyright-communications interface. Mr. Railsback said "The Federal Communications Commission and the Copyright Commission are two separate commissions with entirely separate jurisdictions, proceedings, and functions."

The issues before the two bodies are clearly distinct. The FCC disclaimed any role in determining fair compensation to copyright owners and the Tribunal expressed no views on determinations reached by the FCC on communication matters. The FCC decision was to give cable operators freedom to make business judgments as to which distant signals to carry, not to direct carriage of additional signals.

The FCC was concerned with whether the size of the audience watching the additional distant signals would be so great that local broadcasting stations would sustain financial losses and thus be required to reduce the news and public affairs programming they provided to their communities. Although the agencies approached the issues from different perspectives, they both reached the conclusion that there would be audience diversion and revenue loss as a result of additional signal carriage. However, the Tribunal under its statutory mandate was not limited to considering audience diversion.

The pleadings of the cable industry before the Court of Appeals in two unsuccessful efforts to stay our rate adjustment confirm that a significant number of additional distant signals are still being carried at the adjusted rates. Press stories subsequent to the March 15 effective date have uniformly commented that earlier estimates of the number of distant signals being dropped were greatly exaggerated. Using cable industry data, it is clear that the FCC's communications policy decision is being implemented in a manner that now provides fair compensation to copyright owners.

Question 3: If the 3.75 percent rate proves to be too high for all but a few cable systems, will the copyright holders themselves move to have the rate lowered? Can negotiations take place between the parties independent of the legal apparatus? Should such negotiations be permitted?

Response: The Copyright Act permits affected parties to petition the Tribunal in 1985 for the commencement of a cable royalty adjustment proceeding, specifically including the rates adopted by the Tribunal in 1982. The Tribunal cannot speculate as to what positions may be asserted by parties at that time. During the 1982 proceeding, members of the Tribunal, in accordance with the statutory mandate to consider the impact of the rate schedule on copyright owners, did request the representatives of the copyright owners to address the issue of the effect of the dropping of certain distant signals on copyright owners.

The purpose of Section 111 and related provisions is to protect those cable operators who comply with the statutory requirements from being subjected to suits for copyright infringement. The Copyright Act does not make illegal private licensing arrangements between copyright owners and cable operators. In accordance with the public policy purposes reflected in the Copyright Act, the Tribunal in all its proceedings welcomes and encourages voluntary agreements.

Question 4: I understand that in the rate adjustment proceedings the Tribunal had conducted for other industries you have allowed from five months to two years for the affected industries to adjust to the new higher rate. Your recent cable royalty decision gave the cable industry just over two months to adjust. Would you care to comment?

Response: The only cable operators affected by the 3.75 rate are the small percentage of the total number of cable systems in the United States who added additional signals without awaiting the outcome of the rate proceeding, which was initiated by petition to the Tribunal of the National Cable Television Association (NCTA). NCTA argued that an immediate Tribunal proceeding was urgent so that cable operators could make judgments as to whether or not they desired to add additional signals. At the time of the effective date of the Tribunal's adjustment, some operators were carrying additional signals at the unadjusted rates for up to 18 months. As previously mentioned, the copyright owners and broadcasters urged the Tribunal to make the royalty schedule effective as of July 1, 1981. The Tribunal declined to make any retroactive application because of its major impact on the affected cable operators. The Tribunal determined that an effective date of January 1, 1983 was a reasonable accomodation and provided

more than adequate time for cable operators to make determinations as to which signals they desired to carry.

Question 5: Some of the copyright holders have said that the recent increase in the cable rate will on average raise the cost to the cable subscriber by 35 cents a month. Does this figure seem accurate to you?

Response: The Tribunal, on its own motion, sought from the parties information as to the impact of proposed rate schedules. By utilizing record evidence as to the basic receipts and number of subscribers of the average affected cable systems, it is possible to make estimates of the average added monthly cost per subscriber. This evidence suggests that a cable operator could add four distant network affiliates or one commercial independent signal for a total cost of approximately 35 cents a month per subscriber. In considering this evidence it is also necessary to ascertain the extent to which higher copyright fees may be absorbed by cable operators, and to look at the total copyright payments being made by a cable operator for the carriage of distant signals.

QUESTIONS SUBMITTED BY SENATOR HATCH:

Question 1: Do you believe there is a continuing justification for the compulsory license mechanism or could it be partially eliminated or modified?

Response: The Tribunal in previous testimony before the Senate and House legislative committees has expressed our view concerning the existing statutory compulsory licenses on the basis of the experience garnered from our proceedings. It has been our position that the test to be applied to a compulsory license is whether, in the absence of the license, does a user have the opportunity without unreasonable clearance burdens to obtain timely access to copyrighted works at a reasonable price. As to the cable compulsory license, we testified before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice in 1981 that:

> It is our view that central to the consideration of this issue is the finding of Congress in 1976 that 'it would be impractical and unduly burdensome' to require the operators of cable systems to negotiate with copyright owners whose works are retransmitted by cable systems. We are not aware of any changes in copyright clearance procedures that presently provide justification for altering the judgment of the Congress that a cable compulsory license is currently necessary.

We currently have no reason to alter that testimony.

Another issue to be considered in the justification of the cable license is the current and future role of distant signals in the operations of cable systems. It may be that the determinations now being made by cable operators, often after consultation with subscribers, will give both the Congress and the Tribunal useful information on the role of distant signals.

On the basis of our cable proceedings, we cannot find any public policy justification for now fixing cable copyright royalties below the fair value of the copyrighted works in the distant signals market. Not only is such a practice unfair to copyright owners and conventional broadcasters, it serves to distort the competition among a variety of sources providing product to cable operators. If the Congress retains the compulsory license but undertakes to amend section 111, we recommend that a fee schedule be adopted which would

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provide that the rates for all distant signals now be established at reasonable marketplace rates and without any discounts to assist the development of the cable industry.

Question 2: If a broadcast station retransmitted by cable systems were to compensate copyright owners directly for the value of the cable audience in free marketplace negotiations for exhibition rights to television programming, what justification would there be for the imposition on cable systems of any copyright fee additional to those fees established by Congress in the Copyright Act?

Response: The Tribunal has not found in the record of our 1982 proceeding evidence to permit any finding that broadcast stations retransmitted by cable systems are compensating copyright owners directly for the distant signal audience. No such scheme has been presented to the Tribunal, although an intervenor in the appeal of our rate determination (who did not participate in the Tribunal proceeding) has presented such a proposal to the Court of Appeals. Our preliminary observation is that it may be difficult to determine that stations are paying more for programming for the distant signal audiences, as opposed to other factors. The Tribunal in all of its proceedings has endeavored to prevent so called "double payment" and to encourage marketplace agreements. The Tribunal, at the proper time, will give full consideration to any evidence presented to it on this subject.

Question 3: The Copyright Act of 1976 contains a statutory royalty fee rate. Upon what statutory authority did the Copyright Royalty Tribunal rely in its efforts to establish a royalty fee rate that approximated a marketplace price for the retransmission of distant broadcast signals by cable systems in it November 1983 royalty fee adjustment proceeding?

Response: 17 USC 801(b)(2)(B). This statutory language originated in the House of Representatives and was not contained in the original Senate bill. The report of the House Committee on the Judiciary at page 176 states:

> The purpose of this provision is to give the Commission broad discretion to reconsider the royalty rates applicable to (but only to) the carriage of any additional distant signals permitted under the rules and regulations of the FCC after April 15, 1976.

Question 4: How can you explain the apparent inconsistency between your effort to approximate a marketplace price and the declining fee schedule established by Congress in section 111(D) of the Copyright Act of 1976?

Response: We determined in our cable royalty proceeding that the fee for additional distant signals should be a uniform flat rate. This determination was reached on the basis of the record presented in a specific proceeding, and as an appropriate response to the situation created by the total repeal of the FCC distant signal rules. We express no views concerning how this issue should be resolved in other situations, or in a legislative resolution.

We determined on the basis of our review of the legislative history that the statutory fee schedule was not based upon any deliberative findings by Congress, that neither the declining rate concept nor the levels selected represented an appropriate schedule, and that section 801(b)(2)(B) very clearly states that the rate for additional signals is to be derived independently.

The evidence presented in our record established that a flat rate is consistent with the manner in which all other programming is cur-

rently licensed in the industry. Furthermore, the common carriers charge each system a flat rate for transmission of the superstations; this rate applies regardless of the ranking of the superstation among the distant signals carried by the cable system.

QUESTIONS SUBMITTED BY SENATOR DECONCINI

Question 1: Your decision in the recent cable television rate adjustment proceeding has been critized as being merely a restatement of the parties' arguments without any explanation of how you came to your decision, and second do you believe you need more staff to enable you to write more comprehensive and reasoned decisions?

Response: The Tribunal's opinion is not "merely a restatement of the parties' arguments." The opinion is a detailed and critical analysis of evidence presented by all parties. The parties appealing our rate determination in the cable case, as well as parties appealing our determinations in other rate cases and cable distribution proceedings, object because the particular rate or numbers adopted by the Tribunal are not directly linked to specific formulas or studies. The Tribunal has consistently asserted that the nature of the issues submitted to it do not permit such mathematical certitude. These challenges to the Tribunal's determinations have been uniformly rejected by the Courts of Appeals.

The only Tribunal staff is the Commissioners' personal secretaries. When the current structure of the Tribunal was adopted by the House of Representatives in 1976, the Judiciary Committee directed that the Commissioners perform themselves all professional functions. It was also stated that the Tribunal for each rate proceeding should be in a position to hire on a temporary basis expert consultants to assist in a particular rate proceeding. Funds for this purpose have not been appropriated, and the Tribunal has thus functioned without any professional or expert staff support. We have periodically indicated that, for specific proceedings, the assistance of expert technical consultants might be useful. We have also testified that a permanent professional staff would not be constantly utilized because of the erratic scheduling of our proceedings under the statute.

Question 2: The statutory fee schedule is regressive, reflecting the incrementally lesser value of each distant signal to a cable system. Why did you in your recent rate adjustment decision abandon the concept that Congress had originally implemented?

Response: We determined in our cable royalty proceeding that the fee for additional distant signals should be a uniform flat rate. This determination was reached on the basis of the record presented in a specific proceeding, and as an appropriate response to the situation created by the total repeal of the FCC distant signal rules. We express no views concerning how this issue should be resolved in other situations, or in a legislative resolution.

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The evidence presented in our record established that a flat rate is consistent with the manner in which all other programming is currently licensed in the industry. Furthermore, the common carriers charge each system a flat rate for transmission of the superstations; this rate applies regardless of the ranking of the superstation among the distant signals carried by the cable system.

Question 3: Do you think that if a broadcaster who is carried as a long distance signal is paying market value for the material they broadcast that they should be exempt from the increase in royalty rates.

Response: The Tribunal has not found in the record of our 1982 proceeding evidence to permit any finding that broadcast stations retransmitted by cable systems are compensating copyright owners directly for the distant signal audience. No such scheme has been presented to the Tribunal, although an intervenor in the appeal of our rate determination (who did not participate in the Tribunal proceeding) has presented such a proposal to the Court of Appeals. Our preliminary observation is that it may be difficult to determine that stations are paying more for programming for the distant signal audiences, as opposed to other factors. The Tribunal in all of its proceedings has endeavored to prevent so called "double payment" and to encourage marketplace agreements. The Tribunal, at the proper time, will give full consideration to any evidence presented to it on this subject.

QUESTION SUBMITTED BY SENATOR MATHIAS TO MR. RAY

Question: In its January 1980 report ot Congress, the Copyright Royalty Tribunal argues that the compulsory licensing of pictorial, graphic and sculptural works under Section 118 of the 1976 Copyright Act has not worked well in practice and should be dropped in favor of "the traditional operation of the copyright system, the freedom of the creators of visual works." Do you have any further comments on the experience of the Tribunal with this provision since January 1980? Does the Tribunal still recommend the repeal of the compulsory license for pictorial, graphic and sculptural works?

Response: I have reviewed the Tribunal's report to the Congress on the non-commercial broadcasting compulsory license with the benefit of the knowledge and experience gained from the Tribunal's 1982 proceeding on the non-commercial broadcasting royalty adjustment. I concur in the analysis and recommendations of the Tribunal.

The Tribunal's position is unchanged from that set forth in the report to Congress.

Senator MATHIAS. Thank you.

The committee stands adjourned, subject to the call of the Chair.

[Whereupon, the subcommittee hearing was adjourned at 3:20 p.m., to reconvene subject to the call of the Chair.]

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